TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. ~~129~~ 132.

CHARLES S. ELDER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO ON THE INFORMATION OF GEORGE STIDGER, THE DISTRICT ATTORNEY OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO, ON THE RELATION OF CHARLES W. BADGLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED OCTOBER 10, 1905.

(19,931.)

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CHARLES S. ELDER, PLAINTIFF IN ERROR,

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1 In the Supreme Court of the State of Colorado.

Pleas before the Honorable the Supreme Court of the State of Colorado, sitting at Denver, in said State, at a term thereof begun and held at the Capitol Building in said city on the second Monday of April, A. D. 1905, and of the Independence of the United States the one hundred and twenty-ninth.

Present: Hon. William H. Gabbert, Chief Justice, Hon. Robert W. Steele, Hon. John Campbell, Hon. Julius C. Gunter, Hon. Luther M. Goddard, Hon. John M. Maxwell, Hon. George W. Bailey, Associate Justices. N. C. Miller, Esq., Attorney General, Richard W. Watson, Esq., Bailiff, Horace G. Clark, Esq., Clerk.

Be it remembered, that heretofore, and on to-wit, the 8th day of April, A. D. 1905, there was filed in the office of said Clerk the following transcript of record, bill of exceptions and assignment of errors, which are in words and figures as follows, to-wit:

2 District Court, City and County of Denver, Second Judicial District.

STATE OF COLORADO, *City and County of Denver, ss:*

Pleas in the District Court of the City and County of Denver, State of Colorado, in the First Division thereof, before the Hon. John I. Mullins, one of the Judges of the Second Judicial District of the said State, at a term thereof begun and held at the Court House in Denver, in said County, on the second Tuesday (it being the tenth day) of January, A. D. One Thousand Nine Hundred and Five.

Present: Hon. John I. Mullins, one of the Judges of the District Court. Henry A. Lindsley, Esq., District Attorney of said District. Hamilton Armstrong, Esq., Sheriff of said County. Otis B. Spencer, Esq., Clerk of said Court.

38351.

3 THE PEOPLE OF THE STATE, ETC.,
vs.
CHARLES S. ELDER.

Be it Remembered, that heretofore, and on, to-wit, the 27th day of February, A. D., 1905, came the Petitioner by his attorney, George Stidger, Esq., and filed herein his Amended Petition;

And said Amended Petition is in words and figures as follows, to-wit:

4 STATE OF COLORADO, *City and County of Denver, ss:*

In the District Court.

THE PEOPLE OF THE STATE OF COLORADO on the Information of GEORGE STIDGER, the District Attorney of the Second Judicial District of the State of Colorado, and the Relation of CHARLES W. BADGLEY, Plaintiff,

vs.

CHARLES S. ELDER, Defendant.

Amended Complaint.

Now come the People of the State of Colorado by George Stidger, the District Attorney of the Second Judicial District of said state and on the relation of Charles W. Badgley and give this Honorable Court to understand and be informed in this its amended complaint by leave of the Court first had:—

That one Charles S. Elder a citizen of said state and a resident and qualified elector of the city and county of Denver therein did on, to-wit, the 10th day of January A. D. 1905 without any warrant or authority of law usurp and intrude himself into the office of Treasurer of said city and county of Denver and ever since has continued and still does continue to unlawfully usurp and intrude himself into the said office of Treasurer of the said city and county of Denver and is still usurping and intruding himself into and unlawfully holding and exercising the functions, powers and duties of Treasurer of said city and county of Denver.

5 2. That on, to-wit, the 8th day of November, A. D. 1904, there was held in the city and county of Denver a general election under and by virtue of the Constitution and Statutes of the State of Colorado, at which election, state, county and precinct officers were voted for and at said election in said city and county of Denver your plaintiff was the candidate of the Republican party for the office of Treasurer of said city and county of Denver and the defendant Charles S. Elder was the candidate of the Democratic party for said office and that at said election said plaintiff Charles W. Badgley and said defendant Charles S. Elder were voted for at said election by the electors of said city and county of Denver for said office.

3. That during all the time herein mentioned the said plaintiff Charles W. Badgley was a duly and legally qualified elector of the state of Colorado and of said city and county of Denver and possessed all the qualifications entitling him to said office of Treasurer and rendering him eligible to said office and was and is in all respects eligible to and qualified to hold said office as required by law.

4. That thereafter and on, to-wit, the 9th day of January A. D. 1905, the Temporary Election Commission of the City and County of Denver, in accordance with the provisions of the Charter of the said City and County of Denver adopted as provided by Article XX of the Constitution, on the 29th day of March A. D. 1904, two copies

of which charter (together with the vote for and against the same) duly certified by the Clerk of the said city and county, were within ten (10) days thereafter filed with the Secretary of State of the state of Colorado, which said charter provides that said election Commission shall have the power to canvass the returns of all elections held within said city and county and to issue certificates of election to persons elected to office in said city and county, completed the canvass and the making of the abstract of the votes cast at said election in said city and county of Denver for the several candidates for the office of Treasurer of said city and county as well as for the candidates for the several other County offices voted for at said election and did upon said day canvass the votes cast at said election for the said respective candidates to-wit; the plaintiff and defendant and all other officers voted for at said election and did on the said 9th day of January A. D. 1905 find and declare from said canvass that said plaintiff received at said election the highest number of legal votes cast for any candidate for said office of Treasurer of said city and county of Denver and did upon said day execute and deliver to said plaintiff, Charles W. Badgley, a certificate of his election in and by which certificate said Election Commission did declare said plaintiff to be elected to said office of Treasurer of the said city and county of Denver; that the term of office of said Treasurer to which said plaintiff Charles W. Badgley was elected and to which office he received a certificate of election as aforesaid, commenced on the second Tuesday of January A. D. 1905, being the 10th day of January A. D. 1905.

5. That for some time prior to and down to the 10th day of January A. D. 1905 said defendant Charles S. Elder was the acting Treasurer of said city and county of Denver and was in the possession of said office of Treasurer and of the books, records, papers, documents, monies and other property belonging to said office of Treasurer on the 10th day of January A. D. 1905.

6. Plaintiff further alleges that on the said 10th day of January A. D. 1905, said plaintiff for the purpose of qualifying for said office and to enter into the possession of said office and upon the discharge of its duties according to law, did execute his official bond as such Treasurer for the city and county of Denver in the penal sum of five hundred thousand dollars which is the sum as required by law and conditioned according to law which bond was also executed by sureties good and sufficient as required by law and said plaintiff did also make and subscribe a written oath of office as such Treasurer according to law and did then and there present said official bond and official oath to the Mayor of the city and county of Denver, and requested said Robert Speer, who was then and there Mayor, to approve the same and to receive and accept the same. That the said Mayor of the city and county of Denver then and there refused to accept or receive said bond or oath and refused to consider the same on the ground then and there stated by said Robert Speer, Mayor as aforesaid, that there was no vacancy in said office of Treasurer for the city and county of Denver to fill, at said November election, and that said office was already filled by an incumbent

other than the Plaintiff—meaning the defendant, and that he would not for that reason consider or examine into the sufficiency of said bond and oath or either. That then and there plaintiff also offered said official bond and official oath to Sommers who was then and there Clerk for the city and county of Denver with a request to file the same in his office, for the purpose of qualifying said plaintiff to enter into possession of said office of Treasurer as aforesaid but that said Sommers clerk as aforesaid then and there refused to
8 accept the said bond or written oath of office and refused to file the same in his said office.

That on the same day plaintiff presented his said official bond and official oath to the Board of County Commissioners for said city and county of Denver, for their approval and for the purpose on the part of the plaintiff of qualifying for said office of Treasurer of the city and county of Denver, and that then and there said Board of County Commissioners approved of said official bond and oath and received and accepted the same, and each of them and placed them in their official files.

That all of the above acts and doings regarding said official bond and oath had and done as aforesaid were performed and done before the demand by plaintiff upon the defendant for a delivery of the possession of the office of Treasurer of the city and county of Denver and its insignia of office as hereinafter more particularly set forth.

That afterwards on the said 10th day of January A. D. 1905 after making said demand on the defendant for the said office plaintiff again presented his said official bond and oath to the Board of Supervisors for the city and county of Denver at a regular session of said Board and then and there requested said Board to approve said bond and receive the same and his said official oath but said Board of Supervisors did then and there without stating any reason therefor refuse to examine into, inspect or consider the sufficiency of said official bond and oath or either of them and peremptorily rejected the same without determining the sufficiency of the same.

9 7. That on said 10th day of January A. D. 1905, plaintiff Charles W. Badgley for the purpose of entering upon the duties of his said office as Treasurer of the said city and county of Denver and for the purpose of taking possession of the said office and of the books, records, papers, documents, monies and other property belonging to said office and under the control of the Treasurer and of performing his duties as said Treasurer, went to the office of Treasurer of said city and county and demanded of said defendant, Charles S. Elder, the possession of said office of Treasurer and of the books, records, papers, documents, monies and other property belonging to said office but the defendant Charles S. Elder, refused to surrender the said office or the said books, records, papers, documents, monies and other property belonging to said office to said plaintiff and ever since has failed, neglected and refused to surrender the same or any part thereof to said plaintiff and still refuses to surrender the same or any part thereof to your plaintiff.

Wherefore, the People of the State of Colorado by the said District Attorney pray the advice of the court in the premises and due process of law against the said Charles S. Elder in this behalf to be made and that he, the said Charles S. Elder, may answer to the People of the State of Colorado by what warrant he claims to hold said office of Treasurer or to exercise the powers and perform the duties and receive the fees and emoluments thereof and that he be ousted and excluded from said office of Treasurer of said city and county of Denver and from further holding and exercising the same and that your plaintiff, Charles W. Badgley, be adjudged entitled to said office of Treasurer and entitled to take upon himself
10 the execution of said office as provided by law and for such other and further relief and judgment as to this Honorable Court may seem right and proper and for costs.

GEORGE STIDGER,
District Attorney.

HENRY J. HERSEY,
H. E. LUTHE,
R. J. BARDWELL,
Of Counsel.

11 STATE OF COLORADO, *City and County of Denver, ss:*

Charles W. Badgley being first duly sworn on oath deposes and says that he is the plaintiff named in the above and foregoing complaint, that he has read the above and foregoing complaint and that the facts therein stated are true to his own knowledge except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

CHARLES W. BADGLEY.

Subscribed and sworn to before me this 25th day of February A. D. 1905.

MAUDE A. BENTLEY,
Notary Public.

[NOTARIAL SEAL.]

My commission expires Nov. 1st 1908.

12 (Endorsed:) No. 38351. In the District Court. The People of the State of Colorado on the information of George Stidger the District Attorney of the Second Judicial District of the State of Colorado on the relation of Charles W. Badgley, Plaintiff *vs.* Charles S. Elder, Defendant. Amended complaint. Filed in District Court City and County of Denver, Feb. 27, 1905 Otis B. Spencer, Clerk. George Stidger, Dist. Att'y, H. J. Hersey, H. E. Luthe, R. J. Bardwell, Counsel.

And afterwards, and on, to-wit, the 27th day of February A. D. 1905, came the respondent by his attorneys, Milton Smith and Chas. R. Brock Esqs., and filed herein his Demurrer;

And said Demurrer is in words and figures as follows to-wit:

13 STATE OF COLORADO, *City and County of Denver, ss:*

In the District Court.

No. 38351.

THE PEOPLE *ex Rel.*, &c., Petitioners,
v.
CHARLES S. ELDER, Respondent.

Demurrer.

Comes now the defendant or respondent, in the above entitled action, by his attorneys, Milton Smith and Charles R. Brock, and demurs to the amended complaint of the plaintiffs or petitioners and for cause of demurrer says:

That the said amended complaint does not state facts sufficient to constitute a cause of action.

MILTON SMITH,
CHARLES R. BROCK,
Attorneys for Defendant.

14 (Endorsed:) No. 38351. In the District Court of the City and County of Denver. The People *ex rel.* &c. Plaintiff *vs.* Charles S. Elder, Defendant Demurrer. Filed in District Court City and County of Denver Feb. 27, 1905. Otis B. Spencer, Clerk. Milton Smith, Chas. R. Brock.

15 Be it remembered that heretofore and on to-wit the 27th day of February A. D. 1905, the same being one of the regular juridical days of the January Term A. D. 1905 of said Court, the following proceedings *inter alia* were had and entered of record in said Court to-wit:

No. 38351.

THE PEOPLE OF THE STATE
vs.
CHARLES S. ELDER.

At this day comes the parties hereto by their attorneys respectively, and thereupon the demurrer of defendant to plaintiff's amended complaint is submitted to the Court without argument, and the Court being now sufficiently advised in the premises, doth sustain said demurrer.

(Same Day.)

38351.

THE PEOPLE OF THE STATE
vs.
CHARLES S. ELDER.

At this day comes the said plaintiff by its attorney and saith that it will abide by its complaint herein.

Whereupon, it is ordered by the Court that said defendant go hence hereof, and have and recover of and from the said plaintiff his costs in this behalf laid out and expended to be taxed, and
16 have execution therefor. To which judgment and to the order sustaining the demurrer herein the said plaintiff then and there excepts.

And thereupon and on to-wit the same day, the same being one of the regular juridical days of the January Term A. D. 1905 of said Court, the following proceedings *inter alia* were had and entered of record in the Judgment Book of said Court to-wit:—

38351.

THE PEOPLE OF THE STATE OF COLORADO, on the Information of GEORGE STIDGER, the District Attorney of the Second Judicial District of the State of Colorado, and the Relation of CHARLES W. BADGLEY,

vs.
CHARLES S. ELDER.

Quo Warranto.

The Court having this day ordered that judgment be entered herein in favor of the said respondent Charles S. Elder, on his demurrer to the amended complaint herein, now, therefore,

It is considered by the Court that the said respondent go hence hereof without day and have and recover of and from the said relator Charles W. Badgley, his costs in this behalf laid out and expended to be taxed, and have execution therefor.

17 And thereupon and on to-wit the same day, the following further proceedings *inter alia* were had and entered of record in said Court to-wit:—

38351.

THE PEOPLE OF THE STATE
vs.
CHARLES S. ELDER.

At this day comes the said plaintiff by its attorney and prays an appeal to the Supreme Court of the State of Colorado, which is allowed upon condition that he file herein within five (5) days from this day, his appeal bond in the penal sum of two hundred ($200.00) Dollars with sureties to be approved by the Clerk of this Court.

And time and until thirty (30) days from this day is allowed said defendant within which to prepare and tender to the Judge of this Court, its bill of exceptions by it reserved herein which when signed and sealed by the said Judge shall be filed herein as of this day.

18 And afterwards, and on, to-wit the 4th day of March A. D. 1905, came the petitioner, by his attorneys, and filed herein his Appeal Bond;

And said Bond is in words and figures as follows, to-wit:

Know all men by these presents, that we The People of the State of Colorado and Charles W. Badgley on whose relation the People of the State of Colorado on the information of George Stidger the District Attorney of the Second Judicial District of Colorado so sues as principal and Harry K. Brown, as surety, of the City & County of Denver and State of Colorado, are held and firmly bound unto Charles S. Elder, in the penal sum of Two Hundred Dollars, for the payment of which, well and truly to be made we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Denver, Colo., this fourth day of March in the year of our Lord one thousand nine hundred and five.

The condition of the above obligation is such, that whereas, the said defendant Charles S. Elder did, on the twenty-seventh day of February one thousand nine hundred and five, at a term of the District Court, then being holden within and for the Second Judicial District in the City and County of Denver and state of Colorado, obtain a judgment against the above bounden plaintiffs that plaintiffs' complaint be dismissed and for the sum of Three Dollars and sixty-five cents, costs of suit, from which judgment the said plaintiffs have prayed for and obtained an appeal to the Supreme Court of said State of Colorado.

19 Now if the said plaintiffs shall duly prosecute said appeal, and shall moreover pay the amount of said judgment, costs interest and damages, rendered and to be rendered against them, the said plaintiffs in case the said judgment shall be affirmed in the said *The said* Supreme Court, then the above obligation to be null and void, otherwise to remain in full force and effect.

CHARLES W. BADGLEY. [SEAL.]
HARRY K. BROWN. [SEAL.]

STATE OF COLORADO, *City and County of Denver, ss:*

Harry K. Brown, the surety whose name is subscribed to the above undertaking, being *severally* duly sworn, *each for himself* says: That he is a resident and freeholder within the said City and County of Denver, and that he is worth the sum specified in the said undertaking as the penalty thereof, over and above his just debts and liabilities, in property not by law exempt from execution in this State.

HARRY K. BROWN.

Subscribed and sworn to before me this 4th day of March A. D. 1905.

[SEAL.] WALTER A. PETERSON,
Notary Public.

(Endorsed:) No. 38351. Appeal bond to Court of Appeals of State of Colorado The People &c on the relation of Charles W. Badgley *vs.* Charles S. Elder. Approved and filed this 4th
20 day of March A. D. 1905. Otis B. Spencer, Clerk By J. S. Brown, Deputy.

21 STATE OF COLORADO, *City and County of Denver, ss:*

I, Otis B. Spencer, Clerk of the District Court in and for the City and County of Denver, State aforesaid, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of Amended Petition, Demurrer, Appeal Bond and Orders of Court had and entered of record in a certain cause in said Court lately depending, wherein The People etc *ex rel.* Charles W. Badgley were Petitioners and Charles S. Elder was Respondent, as the same now remain on file and of record in this office.

And I further certify the accompanying Bill of Exceptions to be the original Bill of Exceptions filed in said cause.

Witness my hand and seal of said Court at the Court House in Denver, County and State aforesaid, this 28th day of March A. D. 1905.

[SEAL.] OTIS B. SPENCER, *Clerk,*
By J. F. BROWN, *Deputy.*

22 STATE OF COLORADO, *City and County of Denver, ss:*

In the District Court.

THE PEOPLE OF THE STATE OF COLORADO, on the Information of GEORGE STIDGER, the District Attorney of the Second Judicial District of the State of Colorado, and the Relation of CHARLES W. BADGLEY, Plaintiff,

vs.

CHARLES S. ELDER, Defendant.

Be it remembered, that on the 27th day of February, A. D. 1905, this cause coming on to be heard upon the Demurrer of Defendant

to the Plaintiff's Amended Complaint, the Court found the issues for the Defendant upon said Demurrer and that the Complaint was not sufficient to be answered unto under the law, did then and there enter its judgment against the Plaintiff, that the said Complaint be dismissed, and that the costs of the action be taxed against the Plaintiff. That Plaintiff then and there excepted to the said ruling of the Court and did then and there except to the judgment of this Court dismissing the Complaint.

And the said exception of the Plaintiff to the said ruling not appearing of record in this cause, the same is hereby incorporated into the said records by this Bill of Exceptions,
allowed by the Court, and signed and sealed by the Court this 11th day of March, A. D. 1905, within the time allowed by the order of this Court.

JOHN I. MULLINS, [SEAL.]
Judge.

23 No. 38351. In the District Court. The People of the State of Colorado, on the information of George Stidger, the District Attorney of the Second Judicial District of the State of Colorado and the relation of Charles W. Badgley, Plaintiff, *vs.* Charles S. Elder, Defendant. Bill of Exceptions. Filed in District Court, City and County of Denver, As of Feb. 27, 1905. March 13 1905. Otis B. Spencer, Clerk. Henry Hersey and H. E. Luthe Att'ys for P't'ff.

24 District Court, City and County of Denver, Second Judicial District.

STATE OF COLORADO, *City and County of Denver, ss:*

Pleas in the District Court of the City and County of Denver, State of Colorado, in the First Division thereof, before the Hon. John I. Mullins, one of the Judges of the Second Judicial District of the said State, at a term thereof begun and held at the Court House in Denver, in said County, on the second Tuesday (it being the tenth day) of January A. D. One Thousand Nine Hundred and five.

Present: John I. Mullins, one of the Judges of the District Court. Henry A. Lindsley, Esq., District Attorney of said District. Hamilton Armstrong, Esq., Sheriff of said County. Otis B. Spencer, Esq., Clerk of said Court.

25 STATE OF COLORADO, *City and County of Denver, ss:*

I, Otis B. Spencer, Clerk of the District Court in and for the City and County of Denver, State aforesaid, do hereby certify the *the* attached Supplemental Bill of Exceptions to be the original Supplemental Bill of Exceptions filed in this Court on the 6th day of April, 1905, in the case of the People *ex rel.* Charles W. Badgley *vs.* Charles S. Elder.

Witness my hand and seal of said Court at the Court House in Denver, County and State aforesaid this 7th day of April, A. D. 1905.

OTIS B. SPENCER, *Clerk*.
[SEAL.] By J. F. BROWN, *Deputy*.

26 STATE OF COLORADO, *City and County of Denver, ss:*

In the District Court for said County.

THE PEOPLE OF THE STATE OF COLORADO, on the Information of GEORGE STIDGER, the District Attorney of the Second Judicial District of the State of Colorado, on the Relation of CHARLES W. BADGLEY, Plaintiffs,

vs.

CHARLES S. ELDER, Defendant.

Supplemental Bill of Exceptions.

Be it remembered, that the above entitled cause, having been heard upon the plaintiffs' amended complaint and the defendant's demurrer thereto, and the court having heard arguments of counsel and being sufficiently advised in the premises did on the 27th day of February A. D. 1905 sustain said demurrer and render judgment that plaintiffs' complaint be dismissed and did render and declare the following opinion for its said judgment to which said opinion and judgment the plaintiffs then and there excepted, said opinion being as follows:

27 This is an action by the People on the relation of Charles W. Badgley against Charles S. Elder, for the usurpation of the office of Treasurer of the City and County of Denver. The complaint charges that the defendant "did, on, to-wit, the 10th day of January A. D. 1905, without any warrant or authority of law, usurp and intrude himself into the office of Treasurer of said city and county of Denver, and ever since has continued, and still does continue, to unlawfully usurp and intrude himself into the said office of Treasurer of the said city and county of Denver, and is still usurping and intruding himself into and unlawfully holding and exercising the functions, powers and duties of the Treasurer of the said city and county of Denver."

The relator bases his own claim to the said office upon "a general election under and by virtue of the constitution and statutes of the state of Colorado," held on the 8th day of November A. D. 1904. From the complaint it appears that the relator at said election received a majority of the votes for the office of treasurer of the city and county of Denver, and subsequently a certificate of election was issued to him by the election commission for the city and county of Denver.

On the 10th day of January A. D. 1905, the relator alleges that he demanded possession of the said office, together with the books, and records thereof, from the defendant. This demand was refused.

The complaint further shows the adoption of a charter of the city and county of Denver on the 29th day of March A. D. 1904, and the filing of two copies thereof with the Secretary of State of the State of Colorado.

28 To the complaint the defendant interposed a demurrer upon the ground that the said complaint does not state facts sufficient to constitute a cause of action. The issues of law arising upon said demurrer have been argued and are now before the court for decision.

It will be observed that the charge of usurpation against the defendant is in the language of an ancient form used in *quo warranto* proceedings at common law. It amounts to nothing more than a statement of legal conclusions, and it seems to me is not sufficient under the rules of code pleading.

Attorney-General *v.* Messmore, 14 Wis., 125;
Central & Georgetown Road Co. *v.* People, 5 Colo., 39;
A. T. & S. F. R. R. Co. *v.* People, 5 Colo., 60.

But, treating the allegations as sufficient, when standing alone, to require the defendant to set forth in an answer his own title to said office, yet when the whole complaint is taken into consideration, the conclusion is irresistible that the alleged wrongful usurpation on the part of the defendant consists wholly in the fact that he refused to surrender the office to the plaintiff on January 10th, 1905. The complaint affirmatively shows that the defendant was in the possession of said office, and acting as treasurer, prior to said date.

There is no allegation of fact from which the inference can be drawn that such possession was in anywise illegal.

The defendant's alleged wrongful conduct, therefore, as well as the relator's right, is to be determined solely by the validity of the November, 1904, and May, 1904, elections.

29 Certain reasons were urged by counsel for defendant why the court should take judicial notice of the charter of the city and county of Denver, and of the election held thereunder, in the month of May last. Counsel for plaintiff, however, frankly confessed at the argument that it was their purpose to bring before the court said charter for consideration, and the case was argued upon this theory. It is, therefore, unnecessary to consider or pass upon the question as to whether the court will take judicial notice of said charter. Its enactment is sufficiently charged in the complaint to bring it before the court, even though judicial notice thereof could not be taken in the absence of a pleading on that question. The court does judicially know the officers of the subdivision of the state within its jurisdiction. The court knows, therefore, that the defendant, who was elected treasurer of the city and county of Denver in May last for a term of four years, as by the charter provided, is lawfully in possession of said office, if said May election was a legal one.

The issue raised thus involves a determination of the question as to whether an election for officers to perform governmental functions within the city and county of Denver are to be elected under a charter of the city and county of Denver, or under the general statutes of the state of Colorado. If officers to perform such duties may be

elected under the charter, then such officers could not be legally elected under the general statutes of the State. There is no allegation that the November, 1904, election was held under the charter. On the contrary, it is affirmatively alleged that it was held under the constitution and general laws of the State. The court
30 knows from the provisions of the charter pleaded in the complaint that the election of officers to perform the duties required of county officers in the city and county of Denver must be held in the month of May and not otherwise. Such an election was held. The defendant was elected to the office of treasurer of the city and county of Denver. Was his election legal? The answer to this question will determine the whole controversy, because if the election in May was legal, it follows that the election of the relator in November was absolutely void.

An answer to the question above propounded involves a consideration of certain provisions of Article XX of the State constitution. It was to the construction especially of sections 2 and 3 thereof that the argument on the demurrer was mainly directed. Section 2 of Article XX is as follows:

"The officers of the City and County of Denver shall be such as by appointment or election may be provided for by the charter, and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided; but every charter shall designate the officers who shall respectively perform the acts and duties required of county officers to be done by the constitution or the general laws, as far as applicable. If any officer of said city and county of Denver shall receive any compensation whatever, he or she shall receive the same as a stated salary, the amount of which shall be fixed by the charter, and paid out of the treasury of the city and county of Denver in equal monthly payments."

Section 3 of Article XX provides for the transfer of government from the old county of Arapahoe and the old city of Denver and other municipalities included within the boundary constituting the city and county of Denver into a new entity created by the constitution and called the city and county of Denver. It brought to an end the terms of all officers of the old County of Arapahoe and of the City of Denver, and of all included municipalities, but
31 further provided that the mayor, auditor, engineer, city council, police magistrate and chief of police and boards of the city of Denver should become respectively said officers of the said city and county of Denver, and declared that the said engineer should be *ex officio* surveyor and the Chief of Police *ex officio* Sheriff of the city and county of Denver, the Clerk and Recorder *ex officio* Clerk and Recorder, that the Treasurer, Assessor and Coroner of the County of Arapahoe and justices of the peace and constables, holding office within the city of Denver, should become respectively such officers of the city and county of Denver; but it was expressly provided that said officers should hold said offices as specified only until their successors should be duly elected and qualified as therein provided.

Section 2 of Article XX above quoted, sets forth the method by which their successors are to be elected; that is to say, their successors shall be appointed or elected, as may be provided for by the charter.

Section 4 of Article XX provides the method of adopting a charter for the city and county of Denver, and the complaint shows that in pursuance of Article XX a charter was adopted, as above stated

It was urged at the argument in behalf of relator, that notwithstanding the language of section 2 of Article XX, there was no power in the city and county of Denver to provide in its charter a time for the election of those officers who are to perform the acts and duties required of county officers, and that the delegation of such power to the city and county would render Article XX of itself invalid.

32 A sufficient answer to this is found in the fact that the Supreme Court in People *vs.* Sours, 31 Colo., 369, notwithstanding the objection then urged as it is now urged, held article XX to be valid. Its validity was recognized in Montclair *v.* Thomas, 31 Colo., 327, and in People *v.* Adams, 31 Colo., 476. In the latter case, the opinion was written by Chief Justice Campbell, who had dissented from the opinion of the majority of the court in the Sours case *supra*, and at page 480 he uses the following language:

"The fact that the writer of this opinion believed it (referring to Article XX) inoperative and void, when its validity was directly attacked, should not, and does not, lead him to nullify its provisions by hostile construction, nor does it comport with judicial propriety stubbornly to persist in further dissent from a decision acquiesced in by all departments of government. Rather is it the duty of every member of the court to give effect to the article in accordance with the intent of its framers as far as it can be done consistent with the language in which that intent has been manifested."

Article XX, therefore, is as much a part of the Constitution of this state as any other provision in the Constitution. Its validity is not now a debatable question. It is a part of the organic law of the state. The Courts are bound by its provisions, and where the language is plain and unambiguous, it must be treated as meaning exactly what it says, without interpolations or modification.

The language of section 2 is clear and unambiguous. It needs no explanation or interpretation. It says in substance that the officers of the city and county of Denver may be elected or appointed, as may be provided for in the charter. Their jurisdiction, term, duties and qualifications are to be fixed by the charter. With respect to these questions a decision rests absolutely in the discretion of the people of the city and county of Denver. The only limitation placed upon the power of the people of the city and county

33 is that by mandatory declaration they are required in their charter to designate the officers who shall respectively perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable. The people of the state of Colorado recognize that there would be governmental functions and duties to perform within the territory, which would

not be subject to local control; but they delegated to the people of the city and county of Denver the power to designate the functionary agent or official who should perform such governmental duties.

Where the language is plain and unambiguous, as is that contained in Section 2 of Article XX, the words of the Supreme Court of the United States in Lake County *vs.* Rawlins, 130 U. S. 662, are a complete answer to any argument in favor of interpolation:

"We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the constitution and the people who voted it into existence meant exactly what it says? At the first glance its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers and the people adopting it. This intent is to be found in the instrument itself, and when the text of a constitutional provision is not ambiguous, the courts in giving construction thereto are not at liberty to search for its meaning beyond the instrument."

34 The people have the power, unless their action should be so arbitrary as to destroy a republican form of government to yield up to the people of a given territory the power of local self-government, and certainly there is nothing revolutionary in delegating to the people of a given territory by constitutional amendment the right to select their own officers, especially when the restriction is added as it is in Article XX, that they shall always designate from among the officers so selected those who shall perform the acts and duties required of county officers to be done by the constitution or by the general law of the state.

Martin *vs.* Commissioners, 58 Pac., 934.
Crowley *vs.* Freud, 64 Pac., 698.

I am of the opinion, therefore, that section 2 of Article XX is a complete and absolute delegation of power to the people of the city and county of Denver themselves to determine by a charter what offices shall exist within said territory, what duties shall attach, what qualifications the officers shall have, when the term shall begin, when it shall end, and to elect all of said officers or appoint them, just at such time as the charter itself shall designate, and that annexed to the powers thus delegated there is but one limitation or restriction, and that is, that the charter shall always designate from among its officers those who shall respectively perform the acts and duties required by the constitution and the general law of county officers.

The charter did designate from among the officers provided for by it those who should respectively perform the acts and duties required of county officers under the constitution and general laws of the state. It imposed upon the treasurer of the city and county of Denver the obligation of performing the acts and duties so

35 required of treasurers. By the charter this particular official upon whom the duties resting generally upon treasurers

is imposed, is denominated a treasurer of the city and county, but such official might have been designated by any other name. It is immaterial as to what name he shall have, or when or how he shall be elected. The only requirement in the constitution is, that some one shall be designated to perform the duties imposed upon treasurers, as that word is generally understood, by the constitution and general laws of the state. The fact that the charter designated this particular officer as a treasurer, did not make him a treasurer as that word is understood in other subdivisions of the state. His office is a creature of the charter and not of the constitution. It follows that the election of a treasurer of the city and county of Denver in May, 1904, was valid, and that the alleged election of relator in November, 1904, was absolutely void—void because under the constitution a city and county officer, whatever his name may be, can only be elected under the charter and at the time provided therein, and cannot be elected under the general law.

But aside from these conclusions there is another reason equally potent in leading the court to hold that the charter of the city and county of Denver adopted March 29, 1904, is valid, although it had not been urged by counsel, and that is, the inevitable confusion that is certain to follow should a *Nisi Prius* court under the conditions and circumstances of this case hold the charter or parts of it invalid. Even if there should be doubts of its validity, and I am convinced there are none, these doubts should be resolved in favor of its legality. As Justice Campbell said in the case hereinbefore referred to,
36 "it is the duty of the courts to give effect to the article." One can scarcely conceive the results that are sure to follow should the propositions advanced by the relator be adopted by the lower courts. The attack on the charter is no more nor less than an attack on the Twentieth amendment to the constitution. The same arguments are urged in the one case as in the other. The Supreme Court of this state has declared that the Twentieth amendment is constitutional, and it is not within the province of this court to hold to the contrary. Yet, if we adopt the theory of the petitioner it would precisely amount to over-ruling a higher tribunal. The main purpose of the XX amendment was to secure home rule for Denver. After a great deal of litigation, confusion and expense a charter has been finally adopted and practically acquiesced in by the people and all departments of our government, and it is not the duty of the courts to strain construction of constitutions or laws to defeat the will of the people. It is their duty rather to see that the mandate of the people, especially when it is promulgated in the constitution of the State, is carried out. I see no reason therefore that in anywise suggests that the charter is not clearly within the provisions of the XX amendment, and as the XX amendment has been passed upon by our Supreme Court it is not within the province of this court to change or modify that construction. Nor for the sake of the experiment would I care to assume the responsibility of throwing the city and county government into chaos by holding the constitution unconstitutional.

The demurrer will, therefore, be sustained.

37 And said opinion and exceptions not being a part of the record of this Court in said cause the same is hereby incorporated into the record in said cause by this bill of exceptions this 6th day of April A. D. 1905, being one of the regular days of the January term of this court A. D. 1905 and within the time allowed by law.

Signed and sealed by the Court this 6th day of April A. D. 1905.

JOHN I. MULLINS, *Judge*. [SEAL.]

38 No. 38351. The People &c on the relation of Charles W. Badgley, P'l'ff, *vs.* Charles S. Elder, Def't. Supplemental Bill of Exceptions. Filed in District Court, City and County of Denver, Apr. 6, 1905. Otis B. Spencer, Clerk. George Stidger, District Att'y. Henry J. Hersey, H. E. Luthe, of Counsel for Plaintiff.

39 No. —.

In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO, on the Information of GEORGE STIDGER, the District Attorney of the Second Judicial District of the State of Colorado, and the Relation of CHARLES W. BADGLEY, Appellant,

vs.

CHARLES S. ELDER, Appellee.

Assignment of Error.

Now comes the plaintiffs in error, the People of the State of Colorado, and respectfully represent and show to the Court that in the record and proceedings in the Court below there was manifest and material error to the injury of the said plaintiffs in error in this to-wit:

First. The Court erred in sustaining the demurrer of the defendant in error to the amended complaint of plaintiffs in error.

Second. The Court erred in dismissing said cause.

Third. The Court erred in giving judgment against said plaintiffs in error and in favor of said defendant in error.

Fourth. That the judgment of the Court below is contrary to the law.

Wherefore and for the said errors and for the manifold other errors in the record and proceedings aforesaid plaintiffs in error pray that the said judgment against them be set aside and for naught held and that said cause be remanded to the court below with

40 instructions to reinstate said cause and to make and enter an order over-ruling said demurrer of said defendant in error and that said defendant in error be required to answer said complaint and that plaintiffs in error recover their costs.

GEORGE STIDGER,
District Attorney for the Second District of the State of Colorado.

H. E. LUTHE,
HENRY HERSEY,
Of Counsel for Plaintiffs.

41 And afterwards and on to-wit: the 23rd day of June A. D. 1905, the following proceedings were had and entered of record to-wit:

No. 5622.

THE PEOPLE OF THE STATE OF COLORADO on the Information of GEORGE STIDGER, the District Attorney of the Second Judicial District of the State of Colorado, on the Relation of CHARLES W. BADGLEY, Appellants,

vs.

CHARLES S. ELDER, Appellee.

At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said District Court in and for the city and county of Denver, as also upon the matters assigned for error herein; and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the Court, and it appearing to the Court that there is manifest error in the proceedings and judgment aforesaid of said District Court. It is therefore considered and adjudged by the court that the judgment aforesaid of said District Court be, and the same is hereby reversed, annulled, and altogether held for naught; and that this cause be remanded to said District Court with directions to overrule the demurrer to the amended complaint and enter judgment in favor of plaintiff and against defendant as prayed for in such amended complaint.

42 It is further considered and adjudged by the court, that said appellants do have and recover of and from said appellee their costs in this behalf expended, to be taxed, and that they have execution therefor, and let the opinion of the court filed herein be recorded.

43 And afterwards and on to-wit: the 10th day of July the following further proceedings were had and entered of record, to-wit:

No. 5622.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* CHARLES W. BADGLEY and CHARLES W. BADGLEY, Appellants,

vs.

CHARLES S. ELDER, Appellee.

Appeal from District Court of the City and County of Denver.

This cause now coming on to be heard, upon the petition for a rehearing herein, and upon consideration thereof, and the Court being now fully advised in the premises: It is considered and adjudged by the Court that the said petition be, and the same is hereby denied and that the judgment heretofore and on to-wit, June 23rd entered herein, be, and the same is hereby modified and judgment

ordered entered in this Court; It is therefore considered and adjudged by the Court that the judgment of the District Court of the said City and County of Denver be, and the same is hereby reversed, annulled and altogether held for naught, and the Court doth further Order, Adjudge and Decree that the said relator and plaintiff, appellant herein, Charles W. Badgley, is the lawfully elected and duly qualified Treasurer of the City and County of Denver, of the State of Colorado, and is entitled to hold and exercise said office and to perform the duties thereof and to receive the emoluments
44 thereof and that the defendant Charles S. Elder is guilty of usurping, intruding into and holding, exercising and executing the said office of Treasurer and performing the duties thereof and receiving the emoluments thereof, and it is further ordered, adjudged and decreed that the said defendant Charles S. Elder, appellee herein, be and he is hereby excluded from the said office of Treasurer of the said City and County of Denver and from exercising any of the duties pertaining thereto and receiving the emoluments thereof and that he the said defendant Charles S. Elder do forthwith yield and deliver up to the said plaintiff and relator, appellant herein, Charles W. Badgley, the said office of Treasurer of said City and County of Denver, and all the books, papers, keys, furniture, property, rooms, documents, moneys, and records belonging to or pertaining to said office or the business thereof, and all and every thing or things of whatsoever name or nature which may belong to said office or the business thereof.

It is further ordered and adjudged by the court that the said appellant do have and recover from said appellee his costs in this behalf expended to be taxed and that execution issue therefor.

And let the opinion of the court filed herein be recorded.

Justices Steele and Gunter dissenting.

45 And afterwards, and on, to-wit: September 15th, A. D. 1905, there was filed in our said court, in the office of the clerk thereof, a petition for a writ of error to our said court from the supreme court of the United States, an assignment of errors, an order allowing said writ of error, a writ of error issued in pursuance thereof, a citation thereon, and a bond; and on said 15th day of September, A. D. 1905, there was lodged in the office of the clerk of the supreme court of the state of Colorado for the adverse parties, three copies of said original writ of error.

46 UNITED STATES OF AMERICA,
District of Colorado, State of Colorado, ss:

I, Horace G. Clark, clerk of the supreme court of the state of Colorado, in the United States of America, do hereby certify the above and foregoing to be a true and complete and perfect transcript and copy of the record and proceedings had in the case of The People, etc., appellant, *v.* Charles S. Elder, appellee, No. 5622, as the same remains of record on file in my office; and I herewith annex to and transmit with the record a copy of the opinion of the supreme court of the state of Colorado filed herein in this cause, and also

a copy of the opinion of the supreme court of the state of Colorado in cause No. 4850, entitled, The People, etc., *v.* Henry V. Johnson, to which reference is made in the opinion in this cause; and I also annex hereto and transmit herewith the assignment of errors which accompanied the petition of Charles S. Elder for a writ of error to the supreme court of the state of Colorado from the supreme court of the United States, the order allowing said writ of error, *the writ of error,* the citation, and the bond executed and approved upon the allowance and issuing of said writ of error.

In witness whereof, I have caused the seal of the said court to be hereunto affixed at the city of Denver, in the district and state of Colorado, this 29th day of September, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and twenty-ninth.

[Seal Supreme Court of the State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado.

47 No. 5622.

THE PEOPLE OF THE STATE OF COLORADO on the Information of GEORGE STIDGER, the District Attorney of the Second Judicial District of the State of Colorado, on the Relation of CHARLES W. BADGLEY, Appellant,

vs.

CHARLES S. ELDER, Appellee.

Appeal from the District Court of the City and County of Denver.

Mr. Justice MAXWELL delivered the Opinion of the Court:

This action relates to the office of county treasurer of the city and county of Denver.

The facts so far as they relate to the office of county treasurer are substantially the same as those set forth in People *ex rel.* etc. *v.* Alexander, No. 4976.

48 The judgment of the court below was one of dismissal against the appellant, from which is this appeal.

For the reasons stated in People *ex rel.* etc. *vs.* Johnson No. 4850, the judgment of the court below will be reversed, set aside and for naught held, and judgment rendered and entered in this court in favor of appellant, Charles W. Badgley and against appellee, Charles S. Elder, as prayed in the amended complaint, and that appellant have judgment for costs.

Judgment Accordingly.

Decision En Banc.

Justices Steele and Gunter Dissenting.

49 No. 4850.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of N. C. MILLER, the Attorney General of the State of Colorado, Petitioner,

vs.

HENRY V. JOHNSON, Respondent.

Original Proceeding in Quo Warranto.

Mr. Justice MAXWELL delivered the opinion of the Court:

This information in *quo warranto*, filed by leave of court, by the people of the state of Colorado on the relation of N. C. Miller, the attorney-general of the state charged, that one Henry V. Johnson, a citizen of said state and a resident and qualified elector of the city and county of Denver therein, did on to-wit the 1st day of
50 June 1904, without any warrant or authority of law usurp and intrude himself into the office of county judge of the city and county of Denver and ever since has continued and still does continue to unlawfully usurp and intrude himself into said office of county judge of the city and county of Denver; that he the said Henry V. Johnson is now unlawfully holding a regular term of the county court of said city and county of Denver, and is still usurping and intruding into and unlawfully holding and exercising the functions of judge of the county court in said city and county of Denver, and called upon to answer by what warrant he claims to hold such office or exercise the powers, perform the duties and receive the fees and emoluments thereof, and that he be ousted and excluded therefrom.

In response to a rule to show cause, duly served, respondent filed his answer and return, wherefrom it appears, in substance, that he is a duly qualified elector in and for the city and county of Denver, and in every way qualified to hold the office of county judge of said city and county; that under and by virtue of Article XX of the constitution of the state of Colorado, pursuant to an election ordered by ordinance of the city council of Denver, a special election was held at which members of a charter convention were elected, which charter convention framed a charter for the city and county of Denver in harmony with said Article XX of the constitution; that on the 29th of March 1904, said charter so framed by said charter convention was submitted to the qualified electors of the city and county of Denver, and by such qualified electors was approved, and became and was and is the charter of said city and
51 county of Denver; that in and by said charter it was provided that the county court of the city and county of Denver should consist of two judges; that at the next city and county election two judges should be elected, one of whom should be for the short term; that the judge elected for the short term should within thirty days after his election, qualify and enter upon the duties of his office and should hold such office until the second Monday of January 1907; that the judge elected for the long term should enter upon the duties of his office on the second Tuesday of January 1905, and

hold office for a term of four years; that the judges of the county court should be elected, one every two years, each for a term of four years; that such judges should be elected at the same time and manner as other officers of the city and county of Denver, at the general city and county election next preceding the expiration of their respective terms of office; that in case of vacancy occurring from any cause, the mayor by and with the consent of the board of supervisors should appoint a person possessing the qualifications herein provided for county judges, to act as such judge until his successor is duly elected and qualified; that said charter provided that a general city and county election should be held on the third Tuesday in May, being the 17th of May, 1904, and every two years thereafter; that at the first city and county election there should be elected a mayor, auditor, assessor, treasurer, clerk, recorder, coroner, county superintendent of schools, two judges of the county court, 16 aldermen, 7 supervisors, 3 justices of the peace, 3 constables; that the terms of all elective officers shall commence on the first secular day of June following their election, and shall be four years and until
52 their successors are elected and qualified; that at the election held May 17, 1904, respondent was elected to the office of county judge, and within thirty days after such election, qualified and entered upon the duties of said office of county judge, and is now holding said office and discharging the duties thereof, pursuant to such election; denies that he did usurp and intrude himself into the office of county judge of the city and county of Denver and avers that he holds the same and discharges the duties of said office under full warrant and authority of law, and by virtue of his election as hereinbefore stated.

To this answer and return, the people filed a general demurrer, whereby the constitutionality of the charter provisions, relied upon by the respondent, is brought directly in issue.

This is one of eight cases, now pending in this court of like character, involving the title to the following county offices in the city and county of Denver, to-wit: county judge, county assessor, county clerk and *ex officio* recorder, treasurer, constables, sheriff, county commissioners and justices of the peace.

All of these cases were argued orally and submitted at the same time, and all involve substantially the same questions, except that this case involves the further question, whether the charter convention was authorized to increase the number of county judges to two.

In the consideration which the court has given these cases, all of the briefs and arguments filed by counsel, in all of the cases, and all authorities cited have been thoroughly and exhaustively considered by the court.

53 Respondents in these cases are represented by an array of eminent counsel all of whom have filed elaborate, exhaustive and learned briefs and arguments, covering every conceivable phase of every question which might be presented to the consideration of the court. In a multitude of counsel there is wisdom, and necessarily a difference of opinion upon matters under consideration. If it should transpire that this opinion attempts to set forth the views

of counsel as presented in the briefs and arguments filed, as we understand them, which do not coincide with the views of counsel reading the opinion, let not the opinion be criticised upon this account alone until at least the reader has carefully read and analysed the 1500 pages of briefs and arguments filed.

It is the contention of the relator, that the charter convention of the city and county of Denver provided for by Article XX can not legislate in any particular as to the county court, or the county judge or any other office, officer or matter, not of purely local or municipal concern; that the constitution provides for one county judge in each county of the state and requires that all laws relating to courts shall be general and of uniform operation throughout the state, and that the organization, jurisdiction, powers, proceedings and practice of all the courts of the same class or grade, so far as regulated by law, shall be uniform (Constitution § 22, 28 Art. VI); that the charter provisions assuming to increase the number of county judges of the city and county of Denver, to change the time of election of the county judge and time of the beginning and ending of his term, and to legislate in any particular as to the county judge of the county court are unconstitutional and void;
54 that there is nothing in Article XX of the constitution which shows an intention to change the scheme of government in this particular, and if there were, it would be unconstitutional; and that there is nothing in Article XX which shows any intention to grant any power to the charter convention to supersede the provisions of the constitution or general statutes, relating to the county or the state government, and, therefore, if the charter convention has legislated or attempted to legislate upon any matter, which supersedes the provisions of the constitution or general statutes, such legislation is unconstitutional and void.

In our opinion the contention of relator is fully sustained by the majority opinion of the court in People *v.* Sours, 31 Colo., 369, and in the opinion of the present Chief Justice specially concurring.

At page 385 Mr. Justice Steele in delivering the majority opinion says:

"Counsel say: 'Had it been the intention that the constitution and laws should be in force in this territory, this instrument would have so stated. The language of the above provisions is plain and unambiguous. It has been said that in construing a constitutional provision it will be presumed that every word was weighed and its meaning carefully considered before its insertion in the instrument; and this instrument says that the city and county of Denver can adopt any measure and shall always have the exclusive power to make, alter and revise their charter. That means everything. If not, why not? This charter is to be the organic law. A legislative act is now the charter of the city of Denver, and the constitution of this state and the laws thereof constitute the organic law of this county. But this instrument changes all this, and says that the charter as framed by the charter convention shall not only be the charter of the city and county but shall be the organic law thereof.

That language means something. It displaces and was intended to displace the constitution, the laws and the general assembly.'

If this amendment must be given that construction, it can not be sustained. Even by constitutional amendment, the people
55 cannot set apart any portion of the State in such manner that that portion of the state shall be freed from the constitution, or delegate the making of constitutional amendments concerning it to a charter convention, or give to such charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from municipal, or city, government. The duties of judges of the district court, county judges district attorneys, justices of the peace, and, generally, of county officers, are mainly governmental; and so far as they are governmental they may not be controlled by other than state agencies without undermining the very foundation of our government. Under the constitution of the United States, the state government must be preserved throughout the entire state; and it can be so preserved only by having within every political subdivision of the state, such officers as may be necessary, to perform the duties assumed by the state government, under the general laws as they now exist or as they may hereafter exist.

This distinction between the governmental duties of public officers and their municipal duties is fundamental, and therefore is not avoided or affected by the consolidation.

'Counties, townships, school districts and road districts do not usually possess corporate powers under special charters; but they exist under general laws of the state which apportion the territory of the state into political divisions for convenience of government and require of the people residing within those divisions the performance of certain public duties as a part of the machinery of the state; and in order that they may be able to perform those duties, vest them with certain corporate powers. Whether they shall assume those duties or exercise those powers, the people of the political divisions are not allowed the privilege of choice; the legislature assumes this division of the state to be essential in republican government and the duties are imposed as a part of the proper and necessary burden which the citizens must bear in maintaining and perpetuating constitutional liberty.'—Cooley's Constitutional Limitations 240.*

'*A municipal corporation proper* is created mainly for the interest, advantage and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for the purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state and are in fact, but a branch of the general administration of that policy.—1 Dillon's Municipal Corporations § 23.'

The respondent's construction, however, is not that placed upon the amendment by the counsel for the petitioners, or, we assume, by the people. The provision that 'Every charter shall designate the officers who shall respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable,' completely contradicts the assumption that the amendment regards such duties as being subject to local regulation and control. The amendment is to be
56 considered as a whole in view of its expressed purpose of securing to the people of Denver absolute freedom from legislative interference in matters of local concern; and, so considered, and interpreted, we find nothing in it subversive of the state government, or repugnant to the constitution of the United States."

At page 410 Mr. Justice Gabbert says:

"* * * the whole scope and purpose of the amendment was to provide home rule for certain cities with respect to certain governmental matters local in their nature. This is apparent from the contents of the amendment itself, as well as the provisions designating what should appear upon the official ballot in order to enable the electors to vote for or against its adoption. Its several provisions all relate to this one general object, and are designed to accomplish this one purpose, in so far as they relate to cities designated in the amendment either by name or class."

And in this connection, the following language of Justice Gabbert is significant, (page 411): "What particular subjects, however, relating to governmental affairs are embraced in the amendment is a matter for the convention assembled to form a charter to most carefully consider. It should also be borne in mind that there may be provisions of the constitution other than Article XX which must be observed in the creation of a charter."

The foregoing construction of Article XX was interpreted and approved by the unanimous opinion of this court in Parsons *v.* People 76 Pac., 672, 32 Colo. where Mr. Chief Justice Campbell said:

"Neither is this revenue act of 1902 in violation of any provision of article XX. In the majority opinion of this court, in People *v.* Sours, 31 Colo., 369, 74 Pac., 167, it was clearly indicated that the general scheme of government therein contemplated is restricted to that of the municipality proper, and does not intrench upon county or state government. It does not purport to nullify the constitution or general laws of the state in so far as they pertain to county or state government or attempt to interfere with the power of the state in raising state revenue."

The above quoted language from the majority opinion in the Sours case was used in disposing of the "second objection" urged by counsel for respondent, in their argument that article XX was inoperative and void. This objection as stated on page 383 of the opinion is as follows:

57 "2. It violates the provision of section 4 of the enabling act providing that the constitution shall be republican in form * * * and not be repugnant to the constitution of the

United States and the principles of the Declaration of Independence."

The "above provisions" referred to in the opinion, as stated by counsel are:

"SEC. 2. The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided."

"SEC. 4. The people of the city and county of Denver are hereby vested with and they shall always have the exclusive power in the making, revising or amending their charter."

And further on: "Whereupon it shall become the charter of the city and county of Denver and shall become the organic law thereof."

"SEC. 5. The citizens of the city and county of Denver shall have the exclusive power to amend their charter or to adopt a new charter, or to adopt any measure as herein provided."

Thus it is seen, the precise question here involved was ruled by the majority opinion in the Sours case.

We might, without further discussion, conclude this opinion at this point, basing our conclusions upon the ground, that the question here presented, under the authorities above cited, is not an open one, but is and must be held to be *stare decisis*.

The ability, learning and force with which counsel, representing respondents, present their views, lead us to state their position, the argument in support thereof, and to point out what we deem to be the fal-acy of both position and argument.

In the first place, counsel concede that the county judge and other county officers down to and including constable, are state
58 officers, in that they derive their existence and powers from the constitution and general laws and perform state and governmental functions.

The position taken by respondent is, the charter having designated "the officers who shall respectively perform the acts and duties required of county officers to be done by the constitution or by general law" notwithstanding the fact that the county judge and other county officers are constitutional officers performing state and governmental functions, and notwithstanding the fact that the powers, jurisdiction and procedure of the county court are prescribed by the constitution and general laws beyond the interference of the charter, the *agencies* for the performance, of such acts and duties having been designated by the charter, the constitution is complied with and a republican form of government preserved.

In other words, so long as the charter designates some one who shall perform the acts and duties of county judge and other county officers, respondent contends, that the charter convention can do what it pleases, with the county court and other county officers. It may abolish them, it may increase the number of incumbents, it may increase the term of office indefinitely, it may change the time of election or abolish elections entirely, making the office appointive, it may vest the appointing power in one man or any number of men, or it may qualify and designate one man to perform the acts and duties of all county officers.

Referring now to the construction placed by this court on article XX the learned Justice who wrote the majority opinion in the Sours case used this language:

59 "If this amendment must be given *that construction,* it can not be sustained."

What construction? Unquestionably the construction contended for by counsel who were seeking to establish the invalidity of the amendment, the construction stated in the quotation immediately preceeding and which called forth, the declaration above quoted. The construction contended for here. A construction which as expressed by counsel for respondent herein, would: "Cut loose the city and county of Denver from any and all constitutional limitations and restrictions, and make the voice of the people, whether deliberately or hysterically expressed, the law in that locality."

In the Sours case, the court repudiated such construction and upheld the validity of the amendment saying: "The amendment is to be considered as a whole in view of its expressed purpose of securing to the people of Denver absolute freedom from legislative interference in matters of *local concern;* and, so considered and interpreted, we find nothing in it subversive of the state government or repugnant to the construction of the United States."

If the majority of the court, in the Sours case had been of the opinion that Article XX had for its purpose the securing to the people of Denver absolute freedom from legislative interference *in all matters,* relating to county and state governmental offices, officers and functions, the inevitable conclusion would have followed, that the amendment would have been held subversive of a republican form of government and repugnant to the constitution of the United States.

The charter adopted March 29th 1904, increases the number of county judges to two, changes the time of election, changes the time when the term of office shall begin, provides that the qualifications of county judges shall be the same as district judges; that in

60 case of vacancy the mayor, with the consent of the board of supervisors, shall appoint; changes the salary and manner of payment; and in addition to the above confers upon the county court jurisdiction in some matters, unnecessary to consider, all of which provisions are contrary to Article VI of the constitution as amended.

The same rule of construction applied by this court to Article XX must be applied to the charter framed under that Article.

This court having held that Article XX could not be sustained, if it purported to cut loose the city and county of Denver from any and all constitutional or legislative limitations and restrictions, it must follow, that a charter framed thereunder, in so far as it purports to accomplish the same thing can not be maintained. Again, referring to the majority opinion in the Sours case:

"Even by constitutional amendment the people cannot set apart any portion of the state in such manner that that portion of the state shall be freed from the constitution."

In what respect "freed from the constitution?" To what extent

"freed from the constitution?" May the people of any portion of the state be freed from any article or any section of any article of the constitution? If yea, where and when must the freeing process cease?

In Ames *v.* People 26 Colo., 83-109, this court has said:

"The test of the constitutionality of a statute is not what has been done but what by its authority may be done."

To concede that Article XX authorizes a charter convention to legislate upon *any subject whatever,* in controvention of *any* of the provisions of the constitution relative to governmental or state matters, or to county or state offices and officers, is to concede
61 that such convention might displace the constitution in every respect, and the charter, being the organic law of the city and county, would thereby become supreme within the territory included in the boundaries of the city and county; hence, we would have a portion of the state freed from the constitution; over which the state had no right to legislate; which could have no interest whatever in any legislation which might be enacted by the state, relating to state and governmental affairs. In short, an *imperium in imperio,* a condition which cannot be brought about or exist, even by constitutional amendment, as emphatically decided by the majority opinion in the Sours case.

This is not a question of whether a *mere change* in the *term* of office and *time* of election of an officer performing governmental duties is an act subversive of a republican form of government; the question is, can the people of the state, by constitutional amendment set apart any portion of the state and vest the citizens thereof with power to legislate upon matters other then those purely local and strictly municipal in their character.

In the Sours case this Court has said that this could not be done, for the reason, that such act would be subversive of a republican form of government, repugnant to the constitution of the United States, and violative of the compact existing between the state and federal government.

If such plenary power to legislate cannot be granted, a single act of legislation, would be invalid, even though it be legislation changing the term of office, and the time of election of county officers, performing state and governmental functions.

To concede the right to legislate upon such matters in the slightest particular must be to concede the right to legislate
62 on all matters, and we would have a community of citizens, representing one-third the population of the state, legislating for themselves upon all matters, and not subject to the general legislation of the state.

Such a condition is the logical result of permitting the first act of inhibited legislation.

If the people of Denver by Article XX are authorized, through a charter convention to change the term of office, time of election and number of incumbents of one state or county governmental office, they are authorized to change all of them, and in any respect they may see fit. The tenure of office might be made for life with power

to name a successor, in which even there would be no election; ten county judges instead of one might be appointed, or the office might be abolished, and the mayor, the sheriff or any other officer designated to perform the duties of county judge or one person might be designated to perform all the duties of all county officers.

Confining the powers of the charter convention to legislate upon matters purely local and municipal in character, as was done by the Court in the Sours case, avoids the contingency above outlined.

In a case pending in this Court, in which respondent herein is named as respondent, wherein was involved the right of the county court of the city and county of Denver, to hear an election contest of the office of mayor, counsel appearing for respondent here, appear therein in the same capacity, and have filed a brief, portions of which are instructive and interesting as to the views of counsel at the time that brief was prepared.

63 "And in the exercise of such special powers as were conferred upon the body politic therein contemplated and mentioned, it was clearly the intent of the article (20) that the general laws and constitution of the state were to be followed. The mere grant of a special power does not carry with it any authority to exercise it in a manner not contemplated by law. The affairs of the City of Denver had for years been a favorite subject of legislation by the general assembly of the state. The people of Denver were governed by the state even in matters peculiarly of local concern and pertaining to the conduct of the municipality. In such affairs, the legislature was the continuous and sole arbiter of our municipal fortunes, and to remedy this evil, the article in question was submitted and adopted. When its purpose is considered, it will be found helpful in ascertaining the extent to which the article was carried. *Home rule had a well defined meaning. It meant that as to all the affairs of the City and County of Denver, which affected the relations of the citizens with their local government, they should be freed from State interference, regulation or control; that the system of public improvements, the building of streets or alleys, the appointment of officials, the designation of their duties and how they should be performed, and all other matters purely of local interest, advantage and convenience should be left* to the people of Denver for their own determination. This did not in any wise relieve them from the operation of the general law or constitution of the State, nor was it desired that such a condition should exist. The laws of the state and its constitution were as much in force after the adoption of the XX article as before. All public and governmental duties which the people of the new body politic or the corporation itself were to perform, were still binding upon them. The policy of the state government or of the people in reference to the state government was still to be fixed in every part of the state. *The XX article did not set apart a territorial subdivision of the State, where people were to be freed from the general laws binding upon all other portions of the state. It did not attempt to set up a new government which was independent of the law-making department of the state, and invested with authority to govern itself as it might see fit.* It

had no power to inaugerate or establish a revenue *or judicial system* of its own without regard to other portions of the state. Whatever public laws the general assembly might see fit to enact were to apply here, as elsewhere, and to affect the citizens of Denver as they did the citizens of other communities and in the same manner. This was not to be a state within a state, but a republican form of government was to exist throughout the entire state. The purpose of the amendment was to give us freedom in local municipal matters, but not to relieve us from the general laws or other portions of the constitution, in public affairs or governmental matters. We *were free to act in matters of local concern, not in matters of public governmental or state concern. Home-rule for cities means home rule in strictly city affairs.* While we were given special powers not enjoyed by all other portions of the state, these powers so conferred, were of a nature that could not affect us as a part of the state. *We were to enjoy self-government in all relations purely local*
64 *and municipal which did not bring us into contact with the state at large, or its political and territorial subdivisions as such.* All general systems of state policy were still in force here and unaffected by the XX article of the constitution. Where that instrument had provided the manner in which governmental acts were to be performed, and had established a system of procedure, the XX article did not relieve the city and county of Denver from their operation. While we were enabled to enjoy certain municipal privileges, we were still bound by all governmental measures which the state might see fit to adopt and enforce. *It was therefore with reference to these purely local and municipal affairs, that the charter convention was authorized to act.* * * *

To state the matter in another form, so far as the municipality proper was concerned, the charter might prescribe the jurisdiction of the officers created by it, *so long as that jurisdiction was limited to municipal affairs, and not in conflict with either the general law of the state or the constitution, but where the constitution of the general law had spoken upon matters of a public and governmental nature, not purely municipal in their scope the XX article did not affect them.*"

If we are capable of comprehending the English language the foregoing quotation coincides with the views expressed in the majority opinion in the Sours case, which views must be and are decisive of this case.

"The constitution is not to be made to mean one thing at one time and another at some subsequent time, when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable."

People *v.* Scott, 9 Colo., 433.

Counsel for respondent seek to avoid the force and effect of the plain, unambiguous and positive language of the Court in the Sours case, by arguing, that the learned Justice who wrote the opinion of the majority, had in mind the "jurisdiction and duties of public officers" only, and as they say that no attempt has been made under the charter to legislate upon the jurisdiction and duties of public

officers, therefore the language of the learned Justice is not applicable to that particular feature of the charter here under discussion.

65 A close analysis of the language of the opinion discloses that there are three separate and distinct things which the people cannot do even by constitutional amendment.

1. Free any portion of the state from the operation of the constitution.

2. Delegate to a charter convention the making of constitutional amendments.

3. Give to a charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from the municipal or city government.

Under the language used no one of the three things can be done by the people, and it follows, that no *portion* of any one of them can be done; that no portion of the state can be freed from *any* provision of the constitution; that the first step along the road to the accomplishment of either one of the three prohibited acts, is just as much prohibited as the second or third or last steps, and it is the duty of this Court to promptly and emphatically call an immediate halt and a retreat, whenever it is, in a proper manner brought to the attention of the Court, that the first step has been taken or attempted along the forbidden highway.

It should constantly be borne in mind, that Article XX provides that cities of the first and second class may proceed thereunder, and who can say, that if it should appear to other cities of the state, that the charter of the city and county of Denver permitted the citizens thereof to depart from the straight and narrow path of constitutional limitation, we might not have the spectacle of a procession of cities attempting to free themselves from the limitations of the constitution, which might be irksome to them. Such

66 a spectacle or condition would be intolerable and is prevented by the ruling of this Court in the Sours case.

The view we have taken of this case makes it unnecessary to consider other grounds, plausible and of much force, urged by learned counsel for the people and respondent, or to prolong this opinion by a discussion of many principles of law and authorities cited in support thereof to which our attention has been called by counsel for both parties.

Our conclusions are that the propositions presented by this record is not, and since the decision of the Sours case, has not been an open question; that it is there held that authority of the charter convention to legislate under Article XX of the constitution, is limited to matters purely local and municipal in their character; that the provisions of the charter adopted March 29, 1904, increasing the number of judges of the county court to two and changing the time of election of said county judges to May 17, 1904, are invalid and inoperative; that respondent is not entitled to hold and exercise the office of county judge of the city and county of Denver; that the demurrer to the answer and return of respondent should be and is sustained.

This being an original proceeding in this court, it is therefore considered and adjudged that the respondent, Henry V. Johnson, is guilty of usurping, intruding into and unlawfully holding and exercising the office of county judge of the city and county of Denver, state of Colorado, and that by the judgment of this court he, the said Henry V. Johnson, be ousted and excluded from said
67 office and franchise and any and all exercise thereof and that he pay the costs of this proceeding.

Judgment accordingly.

Decision *en banc*.

Justices Steele and Gunter dissenting.

68 In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO, on the Information of GEORGE STIDGER, the District Attorney of the Second Judicial District of the State of Colorado, on the Relation of CHARLES W. BADGLEY, Appellant,

v.

CHARLES S. ELDER, Appellee.

Order.

The above entitled matter coming on to be heard upon the petition of the appellee therein for a writ of error from the supreme court of the United States to the supreme court of the state of Colorado, and upon examination of the said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the supreme court of the United States the questions presented by the record in said matter, it is Ordered, that a writ of error be and is hereby allowed to this court from the supreme court of the United States, and the bond presented by said petitioner be and the same is hereby approved.

Dated, Denver, Colorado, this 15th day of September, A. D. 1905.

WILLIAM H. GABBERT,

Chief Justice of the Supreme Court of Colorado.

69 [Endorsed:] 5622. In the Supreme Court. The People of the State of Colorado, &c., Appellant, *v.* Charles S. Elder, Appellee. Order. Filed in Supreme Court, Sept. 15, 1905. Horace G. Clark, Clerk.

70 UNITED STATES OF AMERICA, *ss:*

To the people of the state of Colorado, on the information of George Stidger, the district attorney of the second judicial district of the state of Colorado, on the relation of Charles W. Badgley, Greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the

office of the clerk of the supreme court of the state of Colorado, wherein Charles S. Elder is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Gabbert, chief justice of the supreme court of the state of Colorado, this 15th day of September, in the year of our Lord one thousand nine hundred and five.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court of Colorado.

Service of a copy of the within citation is hereby accepted and admitted.

THE PEOPLE OF THE STATE OF COLORADO,
GEORGE STIDGER, AND
CHARLES W. BADGLEY,
By HENRY J. HERSEY, *Their Attorney.*

Due service of the above on me personally admitted this 15th day of Sept. 1905.
GEORGE STIDGER.
CHARLES W. BADGLEY.

71 [Endorsed:] 5622. United States of America, *ss:* Citation. Filed in Supreme Court, Sept. 15, 1905. Horace G. Clark, Clerk.

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, To the Honorable the Judges of the Supreme Court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Colorado before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the People of the state of Colorado, on the information of George Stidger, the district attorney of the second judicial district of the state of Colorado, on the relation of Charles W. Badgley, and Charles S. Elder, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, priv-

ilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Charles S. Elder, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you have the same at
73 Washington, within 30 days from the date hereof, in the said supreme court, to be then and there held, that the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 15th day of September, in the year of our Lord one thousand nine hundred and five.

[Seal United States Circuit Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk of the United States Circuit Court
for the District of Colorado,
By ALEXANDER C. HITZLER,
Deputy Clerk.

Allowed by
WILLIAM H. GABBERT,
Chief Justice of the Supreme Court
of the State of Colorado.

74 [Endorsed:] 5622 United States of America, *ss:* Writ of Error (Original) Filed in Supreme Court, Sept. 15 1905 Horace G. Clark Clerk.

75 In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO, on the Information of GEORGE STIDGER, the District Attorney of the Second Judicial District of the State of Colorado, on the Relation of CHARLES W. BADGLEY, Appellant,

v.

CHARLES S. ELDER, Appellee.

Bond.

Know all men by these presents, That we, Charles S. Elder, as principal, and The Pacific Surety Company, a Corporation organized and existing under the laws of the State of California and doing business under the laws of the State of Colorado, as surety, are held and firmly bound unto the People of the state of Colorado,

George Stidger and Charles W. Badgley, in the sum of one thousand ($1,000.00) dollars, to be paid to the said obligees, their successors, representatives and assigns, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of September, A. D. 1905.

Whereas, the above named Charles S. Elder has prosecuted a writ of error to the supreme court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of the state of Colorado, now, therefore:

76 The condition of this obligation is such, that if the above named Charles S. Elder shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and effect.

CHARLES S. ELDER. [SEAL.]
PACIFIC SURETY CO.,
By FRANK L. BISHOP, [SEAL.]
Its General Agent.

[Seal Pacific Surety Company of California.]

ARTHUR C. BARTELS, [SEAL.]
Resident Assistant Secretary.

Signed, sealed and delivered in the presence of
M. E. MINTY.

77 [Endorsed:] 5622 In the Supreme Court. The People of the State of Colorado, &c., Appellants, *v.* Charles S. Elder, Appellee. Bond. Approved this 15th day of Sept. 1905 William H. Gabbert Chief Justice Filed in Supreme Court, Sept. 15 1905 Horace G. Clark Clerk.

78 In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO, on the Information of GEORGE STIDGER, the District Attorney of the Second Judicial District of the State of Colorado, on the Relation of CHARLES W. BADGLEY, Appellant,

v.

CHARLES S. ELDER, Appellee.

Assignment of Errors.

Now comes the appellee, Charles S. Elder, and respectfully submits, that in the record, proceedings, decision and final judgment of the supreme court of the state of Colorado in the above entitled action, there is manifest error, in this, to-wit:

I.

The court erred in holding that the people of the state of Colorado do not have the authority under the constitution and laws of the United States to enact article XX as a part of or as an amendment to their state constitution.

II.

The court erred in holding that the people of the state of Colorado do not have the authority, under the constitution and laws of the United States, to enact section 2 of article XX as a part of or as an amendment to their state constitution.

79

III.

The court erred in holding that the people of the state of Colorado do not have the authority under the constitution and laws of the United States to enact section 3 of article XX as a part of or as an amendment to their state constitution.

IV.

The court erred in holding that article XX of the constitution of the state of Colorado is in conflict with and in contravention of that provision of the constitution of the United States which guarantees to every state a republican form of government.

V.

The court erred in holding that section 2 of article XX of the constitution of the state of Colorado is in conflict with and in contravention of that provision of the constitution of the United States which guarantees to every state a republican form of government.

VI.

The court erred in holding that section 3 of article XX of the constitution of the state of Colorado is in conflict with and in contravention of that provision of the constitution of the United States which guarantees to every state a republican form of government.

VII.

The court erred in holding that article XX of the constitution of the state of Colorado is in conflict with and in contravention of that act of Congress known as the Colorado enabling act.

VIII.

The court erred in holding that section 2 of article XX of the constitution of the state of Colorado is in conflict with and in contravention of that act of Congress known as the Colorado enabling act.

80 IX.

The court erred in holding that section 3 of article XX of the constitution of the state of Colorado is in conflict with and in contravention of that act of Congress known as the Colorado enabling act.

X.

The court erred in holding article XX of the constitution of the state of Colorado to be invalid, as being destructive of a republican form of government in the state of Colorado.

XI.

The court erred in holding section 2 of article XX invalid, as being destructive of a republican form of government in the state of Colorado.

XII.

The court erred in holding section 3 of article XX invalid, as being destructive of a republican form of government in the state of Colorado.

XIII.

The court erred in holding that the people of the state of Colorado do not have the authority, under the constitution and laws of the United States, to provide in their state constitution that the people of the city and county of Denver, one of the subdivisions of said state, may designate of their officers to be provided by their charter, one thereof to perform the acts and duties required of a county treasurer to be done by the constitution and general laws of the state.

XIV.

The court erred in holding that to concede the authority in the people of the state of Colorado under the constitution and laws of the United States, to grant by an amendment to their state constitution to the people of the city and County of Denver the
81 power to designate in a charter to be provided by themselves, an officer of their choosing to perform the acts and duties required of a county treasurer to be done under the constitution and general laws of the state of Colorado, is destructive of a republican form of government.

XV.

The court erred in holding article XX of the constitution of the state of Colorado invalid, in so far as it vests in the people of the city and county of Denver authority to create by their charter the office of treasurer of the city and county of Denver, and to prescribe that the officer to fill such office should be elected in the month of May, 1904, and every four years thereafter, as in said charter prescribed, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of

government, and as being in excess of the constituent power of the people of the state of Colorado as given, defined and limited by the constitution of the United States, and as being destructive of a republican form of government in the state of Colorado.

XVI.

The court erred in holding article XX, and particularly section 2 thereof, invalid as a part of the constitution of the state of Colorado, in so far as it vested in the people of the city and county of Denver, by their charter, authority to fix the term of office of the officer who should perform within said city and county of Denver the duties and functions imposed by the constitution and general laws of the state of Colorado upon county treasurers, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of
82 the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

XVII.

The court erred in holding article XX, and particularly section 2 thereof, invalid as a part of the constitution of the state of Colorado, in so far as it authorized the people of the city and county of Denver to provide by their charter for the election of an officer who shall perform within the city and county of Denver the duties and functions required by the constitution and general laws of the state of Colorado of county treasurers, at a time chosen by themselves, and not at the time provided in the constitution of the state of Colorado generally for the election of county treasurers in the counties throughout the state, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

XVIII.

The court erred in holding article XX, and particularly section 3 thereof, invalid as a part of the constitution of the state of Colorado, in so far as said article provided that the county treasurer of the former county of Arapahoe, in office at the time said article went into effect, should become the treasurer of the city and county of Denver, and should continue in such office until his successor should have been duly elected and qualified thereunto, as provided by article XX, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form

of government in the state of Colorado, and as being in excess
83 of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

XIX.

The court erred in holding article XX invalid as a part of the constitution of the state of Colorado, in so far as it provides for the establishment of a government in the territory of the city and county of Denver, in abrogation of the general rules of government, particularly those relating to the administration of county affairs, set out in the constitution of the state of Colorado, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

XX.

The court erred in holding that it is not within the authority of the people of the state of Colorado, under the constitution and laws of the United States, for them to enact an amendment to their constitution for a special purpose, and thereby have said special constitutional provision take the place of and be effective in lieu of any general constitutional provisions of the state, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

84 XXI.

The court erred in holding article XX to be invalid as a part of the constitution of the state of Colorado, in so far as it provided a scheme of local government in and for the territory embraced within the city and county of Denver, which government should perform therein both municipal and county functions, as being in conflict with that provision of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

Wherefore, the said Charles S. Elder prays that the judgment and decision aforesaid may be reversed, annulled and altogether held for naught, and that he may be restored to all things which he has lost by the action, and because of said judgment and decision.

ROBERT H. ELDER,
MILTON SMITH,
CHAS. R. BROCK,
Attorneys for Appellee, Charles S. Elder.

85 [Endorsed:] 5622. In the Supreme Court. The People of the State of Colorado, &c., Appellants, *v.* Charles S. Elder, Appellee. Assignment of Errors. Filed in Supreme Court, Sep. 15, 1905. Horace G. Clark, Clerk. Robert H. Elder, Milton Smith, Charles R. Brock, Attorneys for Appellee.

Endorsed on cover: File No. 19,931. Colorado supreme court. Term No. 429. Charles S. Elder, plaintiff in error, *vs.* The People of the State of Colorado, on the information of George Stidger, the district attorney of the second judicial district of the State of Colorado, on the relation of Charles W. Badgley. Filed October 10th, 1905. File No. 19,931.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court, U.
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JAMES H. McKENNEY
CLERK

No. 132.

CHARLES S. ELDER, PLAINTIFF IN ERROR,

v.

THE PEOPLE OF THE STATE OF COLORADO, ON THE INFORMATION OF GEORGE STIDGER, THE DISTRICT ATTORNEY OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO, ON THE RELATION OF CHARLES W. BADGLEY.

BRIEF FOR PLAINTIFF IN ERROR.

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No. 132.

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STATEMENT OF CASE.

In 1901 the legislature of the state of Colorado submitted to the people of said state an amendment to the constitution thereof, designated as article XX, which was duly adopted by a vote of the people of said state, and which amendment, among other things, provides as follows:

"Section 1. The municipal corporation known as the city of Denver, and all municipal corporations and that part of the quasi-municipal corporation known as the county of Arapahoe, in the state of Colorado, included within the exterior boundaries of the

said city of Denver as the same shall be bounded when this amendment takes effect, are hereby consolidated and are hereby declared to be a single body politic and corporate, by the name of the 'City and County of Denver.' By that name said corporation shall have perpetual succession, and shall own, possess and hold all property, real and personal, theretofore owned, possessed or held by the said city of Denver and by such included municipal corporation, and also all property, real and personal, theretofore owned, possessed or held by the said county of Arapahoe, and shall assume, manage and dispose of all trusts in any way connected therewith; shall succeed to all the rights and liabilites, and shall acquire all benefits, and shall assume and pay all bonds, obligations and indebtedness of said city of Denver and of said included municipal corporations and of the county of Arapahoe; by that name may sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings; may have and use a common seal and alter the same at pleasure; may purchase, receive, hold and enjoy, or sell and dispose of, real and personal property; may receive bequests, gifts and donations of all kinds of property, in fee simple, or in trust for public, charitable or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests and donations, with power to manage, sell, lease or otherwise dispose of the same in accordance with the terms of the gift, bequest or trust; shall have the power, within or without its territorial limits, to construct, condemn and purchase, acquire, lease, add to, maintain, conduct and operate, water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof, and any such systems, plants or works or ways, or any contracts in relation

or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county, which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary, as may by the charter be provided.

"The general annexation and consolidation statutes of the state shall apply to the city and county of Denver to the same extent and in the same manner that they would apply to the city of Denver if it were not merged, as in this amendment provided, into the city and county of Denver. Any contiguous town, city or territory hereafter annexed to or consolidated with the city and county of Denver, under any of the laws of the state, in whatsoever county the same may be at the time, shall be detached per se from such other county and become a municipal and territorial part of the city and county of Denver, together with all property thereunto belonging.

"The city and county of Denver shall alone always constitute one judicial district of the state.

"Section 2. The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided; but every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable. If any officer of said city and county of Denver shall receive any compensation whatever, he or she shall receive the same as a stated salary, the amount of which shall be fixed by the charter, and paid out of the treasury of the city and county of Denver in equal monthly payments.

"Section 3. Immediately upon the canvass of the vote showing the adoption of this amendment, it shall be the duty of the governor of the state to issue his proclamation accordingly, and thereupon the city of Denver, and all municipal corporations and that part of the county of Arapahoe within the boundaries of said city, shall merge into the city and county of Denver, and the terms of office of all officers of the city of Denver and of all included municipalities and of the county of Arapahoe shall terminate; except, that the then mayor, auditor, engineer, council (which shall perform the duties of a board of county commissioners), police magistrate, chief of police and boards, of the city of Denver shall become, respectively, said officers of the city and county of Denver, and said engineer shall be ex-officio surveyor and said chief of police shall be ex-officio sheriff of the city and county of Denver; and the then clerk and ex-officio recorder, treasurer, assessor and coroner of the county of Arapahoe, and the justices of the peace and constables holding office within the city of Denver, shall become, respectively, said officers of the city and county of Denver, and the district attorney shall also be ex-officio attorney of the city and county of Denver. The foregoing officers shall hold the said offices as above specified only until their successors are duly elected and qualified as herein provided for; except that the then district judges, county judge and district attorney shall serve their full terms, respectively, for which elected. The police and firemen of the city of Denver, except the chief of police as such, shall continue severally as the police and firemen of the city and county of Denver until they are severally discharged under such civil service regulations as shall be provided by the charter; and every charter shall provide that the department of fire and police and the department of public utilities and works shall be under such civil service regulations as in said charter shall be provided.

"Section 4. The charter and ordinances of the city of Denver as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver; but the people of the city and county of Denver are hereby vested with and they shall always have the exclusive power in the making, altering, revising or amending their charter, and, within ten days after the proclamation of the governor announcing the adoption of this amendment, the council of the city and county of Denver shall, by ordinance, call a special election, to be conducted as provided by law, of the qualified electors in said city and county of Denver, for the election of twenty-one taxpayers who shall have been qualified electors within the limits thereof for at least five years, who shall constitute a charter convention to frame a charter for said city and county in harmony with this amendment. Immediately upon completion, the charter so framed, with a prefatory synopsis, shall be signed by the officers and members of the convention and delivered to the clerk of said city and county, who shall publish the same in full, with his official certification, in the official newspaper of said city and county, three times, and a week apart, the first publication being with the call for a special election, at which the qualified electors of said city and county shall by vote express their approval or rejection of the said charter. If the said charter shall be approved by a majority of those voting thereon, then two copies thereof (together with the vote for and against), duly certified by the said clerk, shall, within ten days after such vote is taken, be filed with the secretary of state, and shall thereupon become and be the charter of the city and county of Denver. But if the said charter be rejected, then, within thirty days thereafter, twenty-one members of a new charter convention shall be elected at a special election to be called as above in said city and county, and they shall

proceed as above to frame a charter, which shall in like manner and to the like end be published and submitted to a vote of said voters for their approval or rejection. If again rejected, the procedure herein designated shall be repeated (each special election for members of a new charter convention being within thirty days after each rejection) until a charter is finally approved by a majority of those voting thereon, and certified (together with the vote for and against) to the secretary of state as aforesaid, whereupon it shall become the charter of the said city and county of Denver and shall become the organic law thereof, and supersede any existing charters and amendments thereof. The members of each of said charter conventions shall be elected at large; and they shall complete their labors within sixty days after their respective election.

"Every ordinance for a special election of charter convention members shall fix the time and place where the convention shall be held, and shall specify the compensation, if any, to be paid the officers and members thereof, allowing no compensation in case of non-attendance or tardy attendance, and shall fix the time when the vote shall be taken on the proposed charter, to be not less than thirty days nor more than sixty days after its delivery to the clerk. The charter shall make proper provision for continuing, amending or repealing the ordinances of the city and county of Denver.

"All expenses of charter conventions shall be paid out of the treasury upon the order of the president and secretary thereof. The expenses of elections for charter conventions and of charter votes shall be paid out of the treasury upon the order of the council.

"No franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified tax-paying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treas-

urer) of such submission by the applicant for said franchise. The council shall have power to fix the rate of taxation on property each year for city and county purposes."

"Section 8. Anything in the constitution of this state in conflict or inconsistent with the provisions of this amendment is hereby declared to be inapplicable to the matters and things by this amendment covered and provided for."

In pursuance of the authority conferred by the constitutional provisions above set forth, a charter was adopted by the people of the city and county of Denver on March 29, 1904, portions of which are as follows, to-wit:

"Section 24. The executive power of the city and county shall be vested in a mayor, sheriff, treasurer, auditor, attorney, clerk, assessor, recorder, coroner, county superintendent of schools, and in the departments and commissions herein created."

"Section 51. The treasurer shall receive, receipt for and keep the money of the city and county and pay out the same only on warrants as herein provided."

"Section 52. The treasurer, on receiving any money, except for taxes and assessments, shall make duplicate receipts therefor, upon the face of one of which shall appear the word 'original,' and upon the face of the other the word 'duplicate;' they shall be numbered, dated, specify the amount, on what account, from whom received, and into what fund or on what account paid. He shall enter upon the stub of such receipt a memorandum of the contents thereof, and deliver the receipt marked 'original' to the payor and that marked 'duplicate' to the auditor, who shall stamp thereon the date of its delivery to him, charge the treasury with the amount, and file the receipt in his office."

"Section 53. He shall keep an account with each fund, special or general, and when a warrant is drawn on any particular fund it shall be paid out of that fund only."

"Section 54. No money shall be paid out by the treasurer for any purpose except upon warrants drawn upon him by the auditor unless otherwise provided by this charter. Each warrant shall be registered by the auditor, countersigned by the head of the department or clerk of the court, respectively, under whom the claim or demand covered by such warrant originated. Each warrant shall show on its face the date of its issue, the date of the order of the council or such officer, to whom and for what purpose issued, and from what fund payable. Every warrant issued, as in this charter required, shall, when paid, be canceled with a punch cutting the word 'canceled' therein and the proper entry thereof made; Provided, The treasurer may pay the interest and principal on bonded indebtedness including special improvement bonds as the same become due without a warrant having previously issued therefor."

"Section 55. At the beginning of each calendar month, the treasurer shall report the transactions of his office during the previous month to the auditor, showing the amount of money received, from what source, and on what account, with a list of all city and county warrants, bonds and orders which have been redeemed by him or paid into the treasury as money due the city and county, which warrants, bonds, and orders shall accompany his reports for cancellation, which reports shall be audited by the auditor and certified by him to the council. The treasurer shall also make an annual report of the transactions of his office on or before the second Monday in January, and from time to time such other reports as may be required by the council. If the treasurer shall fail to report, as provided by this section, he shall forfeit

and pay to the city and county the sum of five hundred ($500) dollars for every such failure."

"Section 56. The treasurer shall, on or before the second Monday in January, April, July and October, make to the council and auditor a detailed verified statement of all his accounts and the state of each fund, which shall show all moneys received, from what source and for what purpose, and of all moneys paid out, and to whom and for what purpose. A summary of these quarterly reports shall be published by the auditor with the summary of his annual report."

"Section 57. The treasurer shall give a bond to the and county with sufficient sureties, w ties shall be responsible surety companies, pproved by the mayor and council, in the sum five hundred thousand dollars, and for such additional sum as the mayor and council shall require, conditioned as required by the general statutes relating to bonds of county treasurers, and as may be further required by ordinance, and for paying over to his successor in office all such sums of money belonging to the city and county as shall be in his hands, and to account for and turn over to his successor all moneys deposited with him for any cause whatsoever, and all city and county property which may come to his hands. The cost of said bonds shall be borne by the city and county, to be audited, allowed and paid out of the treasury as provided for the payment of other general expenses."

"Section 58. The treasurer shall, with the approval of the mayor and auditor, select annually, or oftener if necessary, one or more banks or banking institutions in the city and county which will pay the highest interest for the average current deposit of the city and county funds. Before any such deposit shall be made the bank shall give a bond to the city and county with such conditions and in such sum as may be determined by the mayor, auditor and

attorney, but not less than the maximum amount which shall be on deposit at any time. The sureties shall be approved by the mayor, auditor and attorney, and shall be other than the surety on the treasurer's bond. No amount which may be due any depository on account of any evidence of the city and county indebtedness shall be accepted by the treasurer as offset against his deposit with such bank. A verified quarterly statement shall be made to the mayor and auditor by the president or cashier of such bank, showing the amount of interest paid or to be paid by such bank for the use of the city and county funds, and upon failure to make such report after written demand the bank shall forfeit to the city and county the sum of five hundred dollars, and the deposit then remaining in such bank shall immediately be removed and another bank or banks selected as above provided. The surety on such bond shall be a responsible surety company."

"Section 59. The treasurer shall, in addition to performing the duties herein specifically required, perform such other duties not inconsistent with the laws of the state and this charter as the council may by ordinance require."

"Section 166. A general city and county election shall be held in the various precincts in the city and county of Denver on the third Tuesday in May, A. D. 1904, and every two years thereafter, by the qualified electors thereof."

"Section 167. At the first city and county election there shall be elected a mayor, sheriff, auditor, assessor, treasurer, clerk, recorder, coroner, county superintendent of schools, two judges of the county court, sixteen aldermen, seven supervisors, three justices of the peace, three constables."

"Section 168. The term of all elective officers, except as otherwise provided herein, shall commence on the first secular day of June following their elec-

tion, and, except as otherwise provided herein, shall be four years and until their successors are elected and qualified."

As above disclosed the charter created the office of treasurer of the city and county of Denver, and at the May, 1904, election, held in persuance thereof, the plaintiff in error was elected to that office for a term of four years, beginning with the first secular day of June, 1904. In obedience to section 2 of the article of the constitution above set forth, the treasurer of the city and county of Denver was designated as the officer who should perform the acts and duties required of county treasurers to be done under the constitution and general law of the state. This was by virtue of section 156 of the charter, which is as follows:

"Section 156. Except as otherwise herein provided, the officers who shall respectively perform the acts and duties required of county officers to be done by the constitution and the general laws, in all cases not specifically provided for, so far as applicable, shall be as follows: The county judges shall perform the acts and duties required of county judges; justices of the peace, the acts and duties required of justices of the peace; constables and deputy constables, the acts and duties required of constables; the engineer, the acts and duties required of county surveyor; the board of supervisors, the acts and duties required of boards of county commissioners; the board of supervisors shall act as a board of equalization and perform the acts and duties required of a board of county commissioners when sitting as a board of equalization; the assessor, the acts and duties required of county assessor; the treasurer, the acts and duties of a county treasurer; the sheriff, the acts and duties required of sheriff; under-sheriffs, the acts and duties required of under-sheriffs; deputy

sheriffs, the acts and duties required of deputy sheriffs; recorder, the acts and duties required of county clerk as ex-officio recorder; the coroner, the acts and duties required of coroner; the election commission, the acts and duties required of a board of county commissioners, county clerks and justices of the peace in all matters pertaining to registration and elections.

"In case no officer has been specially mentioned to perform the duties of any county officer, or in case any new county office is created, then such office shall be filled by appointment by the mayor, who shall appoint thereto some official of the city and county, who shall thereafter perform the acts and duties required by the constitution or by the general laws to be done by such county officer."

The plaintiff in error qualified as required by law, and entered upon the discharge of the duties of his said office. In November, 1904, at the general election, the relator, Charles W. Badgley, was a candidate in the city and county of Denver for the alleged office of county treasurer, and received a certificate of election. He caused to be instituted a proceeding in *quo warranto* against the plaintiff in error to oust him from said office, or at least to oust him from the discharge of those duties imposed upon a county treasurer under the constitution and general law of Colorado.

The district court of the city and county of Denver, in which said action was instituted, sustained a demurrer to the amended complaint, and, the relator electing to stand on his pleading, said action was dismissed. An appeal was prosecuted to the supreme court of the state of Colorado, which reversed the judgment of the lower court, and itself entered a final

judgment in favor of the relator. The present action was heard in conjunction with various other causes involving the title to other offices which had been filled at the May election held in pursuance of the charter of the city and county of Denver, and the main opinion was rendered in the case of People ex rel. v. Henry V. Johnson, which opinion is set forth at pages 21 to 32 of the transcript, and the judgment of the district court in the present action was reversed for the reasons stated in People ex rel. v. Johnson, as appears from the opinion of the court found at page 20 of the transcript.

Upon the hearing in the district court, and in the supreme court also, as will more fully appear from the record and opinion of court therein, it was contended by the relator that section 2 of article XX of the constitution was and is invalid as a part of the constitution of the state of Colorado, as being in conflict with the enabling act of congress, under which the state of Colorado was organized as a state, and which provided that the government of the state of Colorado should be republican in form, and further as being also in conflict with that provision of the constitution of the United States which provides that the United States shall guarantee to every state in the union a republican form of government, and in said final judgment the supreme court of the state of Colorado so decided and held that said section was and is in conflict both with the said act of congress and said provision of the constitution of the United States, and that it was not within the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitu-

tion of the United States, to incorporate such provision in their constitution.

In said suit relator further contended, and the court so decided, that said article XX was and is invalid as a part of the constitution of the state of Colorado, in so far as it vests in the people of the city and county of Denver power to create by their charter the office of treasurer of the city and county of Denver, and to prescribe that the officer to fill such office should be elected in the month of May, 1904, and thereafter at stated intervals as in said charter prescribed, as being in conflict with said provision of the constitution of the United States, and in excess of the constituent power of the people of the state of Colorado, as given, defined and limited by the constitution of the United States, and as being destructive of a republican form of government in the state of Colorado.

In said suit said relator further contended, and said supreme court in said judgment so decided, that said article XX, and particularly section 2 thereof, was invalid as a part of the constitution of the state of Colorado, insofar as it vested in the people of the city and county of Denver authority by their charter to fix the term of office of the officer who should, within said city and county of Denver, perform the duties and functions imposed by the constitution and general laws of the state of Colorado upon county treasurers, as being in conflict with said provision of the constitution of the United States, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

In said suit said relator further contended, and the court in its final judgment so decided, that said article XX, and particularly section 2 thereof, was and is invalid, insofar as it authorizes the people of the city and county of Denver to provide by their charter for the election of an officer who should perform, within said city and county, the duties and functions required by the constitution and general laws of the state of Colorado of county treasurers, at a time chosen by themselves, and not at the time provided in the constitution of the state of Colorado generally for the election of county treasurers, as being in conflict with said provision of the constitution of the United States, and as being destructive of a republican form of government, and as being in excess of the constituent power of the people of the state of Colorado as such power is given, defined and limited by the constitution of the United States.

Said relator further contended, and the court in its final judgment so decided, that said article XX was and is invalid as a part of the constitution of the state of Colorado, insofar as it provides for the establishment of a government in the territory of the city and county of Denver, in abrogation of general rules of government, particularly those relating to the administration of county affairs set out in the constitution of the state of Colorado, as being in conflict with said provision of the constitution of the United States, and as being destructive of a republican form of government, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

That by such decision the supreme court of the state of Colorado has absolutely eliminated said section 2, and portions of section 3, from the constitution of the state of Colorado, and by thus holding that the people of the state of Colorado had no power to enact a constitutional provision such as that embraced in sections 2 and 3 of article XX, said supreme court held the election of your petitioner to the office of treasurer of the city and county of Denver to be invalid, and entered final judgment of ouster as aforesaid.

On account of said judgment we have filed the following assignment of errors, to wit:

I.

The court erred in holding that the people of the state of Colorado do not have the authority, under the constitution and laws of the United States to enact article XX as a part of or as an amendment to their state constitution.

II.

The court erred in holding that the people of the state of Colorado do not have the authority, under the constitution and laws of the United States, to enact section 2 of article XX as a part of or as an amendment to their state constitution.

III.

The court erred in holding that the people of the state of Colorado do not have the authority under the constitution and laws of the United States to

enact section 3 of article XX as a part of or as an amendment to their state constitution.

IV.

The court erred in holding that article XX of the constitution of the state of Colorado is in conflict with and in contravention of that provision of the constitution of the United States which guarantees to every state a republican form of government.

V.

The court erred in holding that section 2 of article XX of the contstitution of the state of Colorado is in conflict with and in contravention of that provision of the constitution of the United States which guarantees to every state a republican form of government.

VI.

The court erred in holding that section 3 of article XX of the constitution of the state of Colorado is in conflict with and in contravention of that provision of the constitution of the United States which guarantees to every state a republican form of government.

VII.

The court erred in holding that article XX of the constitution of the state of Colorado is in conflict with and in contravention of that act of congress known as the Colorado enabling act.

VIII.

The court erred in holding that section 2 of article XX of the constitution of the state of Colorado is in conflict with and in contravention of that act of congress known as the Colorado enabling act.

IX.

The court erred in holding that section 3 of article XX of the constitution of the state of Colorado is in conflict with and in contravention of that act of congress known as the Colorado enabling act.

X.

The court erred in holding article XX of the constitution of the state of Colorado to be invalid, as being destructive of a republican form of government in the state of Colorado.

XI.

The court erred in holding section 2 of article XX invalid, as being destructive of a republican form of government in the state of Colorado.

XII.

The court erred in holding section 3 of article XX invalid, as being destructive of a republican form of government in the state of Colorado.

XIII.

The court erred in holding that the people of the state of Colorado do not have the authority, under

the constitution and laws of the United States, to provide in their state constitution that the people of the city and county of Denver, one of the subdivisions of said state, may designate of their officers to be provided by their charter, one thereof to perform the acts and duties required of a county treasurer to be done by the constitution and general laws of the state.

XIV.

The court erred in holding that to concede the authority in the people of the state of Colorado under the constitution and laws of the United States, to grant by an amendment to their state constitution to the people of the city and county of Denver the power to designate in a charter to be provided by themselves, an officer of their choosing to perform the acts and duties required of a county treasurer to be done under the constitution and general laws of the state of Colorado, is destructive of a republican form of government.

XV.

The court erred in holding article XX of the constitution of the state of Colorado invalid, in so far as it vests in the people of the city and county of Denver authority to create by their charter the office of treasurer of the city and county of Denver, and to prescribe that the officer to fill such office should be elected in the month of May, 1904, and every four years thereafter, as in said charter prescribed, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being in ex-

cess of the constituent power of the people of the state of Colorado as given, defined and limited by the constitution of the United States, and as being destructive of a republican form of government in the state of Colorado.

XVI.

The court erred in holding article XX, and particularly section 2 thereof, invalid as a part of the constitution of the state of Colorado, in so far as it vested in the people of the city and county of Denver, by their charter, authority to fix the term of office of the officer who should perform within said city and county of Denver the duties and functions imposed by the constitution and general laws of the state of Colorado upon county treasurers, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

XVII.

The court erred in holding article XX, and particularly section 2 thereof, invalid as a part of the constitution of the state of Colorado, in so far as it authorized the people of the city and county of Denver to provide by their charter for the election of an officer who shall perform within the city and county of Denver the duties and functions required by the

constitution and general laws of the state of Colorado of county treasurers, at a time chosen by themselves, and not at the time provided in the constitution of the state of Colorado generally for the election of county treasurers in the counties throughout the state, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

XVIII.

The court erred in holding article XX, and particularly section 3 thereof, invalid as a part of the constitution of the state of Colorado, in so far as said article provided that the county treasurer of the former county of Arapahoe, in office at the time said article went into effect, should become the treasurer of the city and county of Denver, and should continue in such office until his successor should have been duly elected and qualified thereunto, as provided by article XX, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

XIX.

The court erred in holding article XX invalid as a part of the constitution of the state of Colorado, in so far as it provides for the establishment of a government in the territory of the city and county of Denver, in abrogation of the general rules of government, particularly those relating to the administration of county affairs, set out in the constitution of the state of Colorado, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

XX.

The court erred in holding that it is not within the authority of the people of the state of Colorado, under the constitution and laws of the United States, for them to enact an amendment to their constitution for a specific purpose, and thereby have said special constitutional provision take the place of and be effective in lieu of any general constitutional provisions of the state, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state

of Colorado, as such power is given, defined and limited by the constitution of the United States.

XXI.

The court erred in holding article XX to be invalid as a part of the constitution of the state of Colorado, in so far as it provided a scheme of local government in and for the territory embraced within the city and county of Denver, which government should perform therein both municipal and county functions, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

ARGUMENT.

THE QUESTION OF JURISDICTION.

This court has jurisdiction of this issue. The theory of jurisdiction is as follows: (1) The people of Colorado, in amending their constitution, exercised an authority under the United States; (2) in this case, the validity of that authority exercised was actually drawn in question; (3) it was decisive of the issue and there was no other matter adjudged by the court below broad enough to sustain the judgment; (4)

the decision below was against the validity of that authority exercised; (5) the question here is not for the political departments of the federal government but for this court.

MERITS OF THE CASE.

The judgment below was flagrantly erroneous. Article XX of the constitution of the state of Colorado, and particularly section 2 thereof, authorized the city and county of Denver in its charter to create the office of treasurer, and to impose upon the incumbent thereof the obligation of performing the acts and duties required of a county treasurer to be performed under the constitution and general laws of the state; and in the exercise of such authority, the guarantee of a republican form of government by the constitution of the United States has been in no wise disturbed or violated.

The questions above suggested will be discussed in the order of their statement.

I.

IN AMENDING THEIR CONSTITUTION THE PEOPLE OF COLORADO EXERCISED AN AUTHORITY UNDER THE UNITED STATES.

The doctrine of this point is that, in our political system, our states (so-called) are really not states, but merely local government; that they are not sovereign,

and exercise no powers of sovereignty, but are purely local government; that, not being sovereign but purely local government, they must have received the authority from some superior to exercise these local powers of government; that they did receive such authority from their superior, to wit, the sovereign, in our system, viz.: the people of the United States considered as a political unit—as a collectivity.

By the term "sovereignty" is meant supreme, absolute, unlimited power. In every political system there must always be such power lodged somewhere; there must always be some power that can speak the final word in case of dispute. This ultimate authority is sovereignty.

Moreover, this power must be supreme; if there exists any power superior to it, it is the *superior* power that is sovereign. It must be absolute and unlimited; if there exist any restriction or limitation upon it, the power that superimposes the restriction or limitation is sovereign. A "limited sovereignty" never existed. It is a contradiction of terms. The idea that sovereignty can limit itself and thus become "limited sovereignty" is likewire erroneous; for, *self limitation is no limitation*, because if a limitation be self-imposed it can at will be removed.

The old defenders of the divine right of kings had a correct idea of the nature of sovereignty.

"For as kingly power is by the law of God," says Filman (Patriarcha), "so it hath no inferior law to limit it."

Mr. Justice Chase in this court, Ware v. Hylton, 3 Dall., at page 236, expressed the same idea, the exact idea here contended for, when he said:

"There can be no limitation on the power of the people of the United States. By their authority the *state constitutions were made*, and by their authority the constitution of the United States was established; and they had the power to *change or abolish the state constitutions*, or to make them yield to the general government and to treaties made by their authority."

By the term "state" is meant the political form, i. e., the particular individual, or organization, which for the time being holds and exercises this supreme power—sovereignty. A state alone is sovereign; sovereignty is an attribute of a state only; the state is sovereign and sovereignty is the power of the state.

In the term "sovereignty" we get the idea of the nature, extent and character of the power; in the term "state" we get the idea of the particular form, organization, through which is exercised this power. These two terms—state and sovereignty—are then correlative. Since sovereignty is unlimited, absolute power, the power of the state is unlimited and absolute. As no limitation can be put on sovereignty, none can be put on the power of the state. Governments are often limited; states never.

If one person exercises this power, the state is a monarchy; if a few persons, the state is an aristocracy; if the mass of the population, the state is a democracy.

1 Burgess Pol. Sci. & Comp. Const. Law (Character of a State), pages 51-58.

Id. (No federal or composite state), pages 79-82.

Id. (History of Formation of our Const.), pages 98-108.

Id. (The organization of the State), pages 142-154.

Id. (Source of Liberty), pages 175-177.

2 Burgess Pol. Sci. & Comp. Const. Law (Immediate or Representative Govt.), pages 1-4.

Id. (Dual Govt.), pages 5-6.

Id. (Confusion in ideas between State & Local Govt.), pages 7-8.

Id. (U. S. *Govt.* Fed.—*State*, not Federal), page 18, section 2.

Id. (Commonwealths not sovereign; hence suable), pages 330-1.

Id. (Advantages of U. S. Judiciary), pages 363-366.

Davis El. Inter. Law (Sovereignty unlimited), 34-9, et seq.

Case of Exchange (Sovereignty unlimited), 7 Cranch., 116.

Wheaton, Part 1 (Sovereignty unlimited), chapter 2, sections 20-1.

Vattel Liv. 1, Ch. 3 (Sovereignty unlimited), sections 31-7.

1 Halleck, chapter IV (Sovereignty unlimited), sections 1-3, chapter 7.

Manning, Law Nations (Sovereignty unlimited), 92-3.

Black Const. Law (Sovereignty unlimited), 16-26.

Cooley Const. Law (Sovereignty unlimited), chapter 1.

2 Curtis Const'l Hist. (Sovereignty unlimited), 520-1.

Abbott, "Judge & Jury," pages 4-7.

Webster Argument in Luther v. Borden (1 Veeder Legal Masterpieces), pages 560-2.

1 Oppenheim Inter. Law, sections 66-70.

Tiffany, Govt. & Const. Law (Little & Co., Albany, 1867), pages 41-53, 298-326.

Note, therefore, that a state has an international character and work to do. From the view both of history, political science and of law, it is an independent organization in world politics. It is an international unit. Within its own borders, its functions are to establish government and to provide for other local needs. Without its borders, in the economy of the world, its functions are to declare war (if necessary), to make treaties, to protect the integrity of its own organization, and, according to its own will and in its own way, aid in the civilization of the world.

Plainly, then, the people of Colorado do not constitute a state. They exercise no supreme, absolute, unlimited power. Above them is a power that limits them, that restricts them, that, indeed, empowered them originally, and still empowers them, to act. By an enabling act of congress alone were they authorized originally to act in their present form. But, in their own territory, their authority is much limited. Their government can only be republican in form; they can deprive no man of life, liberty or property without due process of law; they can not impair the obligations of contracts; they can not coin money;

they can not declare war; they can not make treaties; they must submit to all the restrictions placed upon them by the constitution of the United States and by all laws of congress enacted in conformance therewith. Moreover, this subjection to a superior power is not imposed on Colorado alone, but is common to all our so-called states. It strips them of any character of statehood, and fixes once for all their status as local administration merely. Every one of them is authorized in and subject to the constitution of the United States. "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law, of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." (Article VI, section 2.)

Where, then, in our system, does sovereignty repose? As no one of our so-called states is sovereign, so the government at Washington is not sovereign. Its jurisdiction, legislative, executive and judiciary, is likewise limited and restricted. The government at Washington, too, has received its authority from a higher power, viz.: the power that made the constitution of the United States; the power that sustained it in civil war, when it demonstrated, by force of arms, the sovereignty of the whole people over and above the so-called states that would have seceded; the power that can now change that constitution to suit itself, make the government at Washington anything it pleases, make the government of any of our so-called

states what it pleases, *by the simple process of amendment*, or even disorganize them altogether.

This function, providing for the government, central and local, and, as incidental thereto, prescribing the sphere upon which governmental power, central or local, shall not intrude to the detriment of the liberty of the individual, is par excellence the function of the state, of sovereignty. (1 Burgess Pol. Sci. & Comp. Const. Law, page 89.) Every true state does this by its constitution, whether written or unwritten, providing therein for government, and, also, unless the whole power of sovereignty is turned over to government, for liberty, as well Government and the state are not the same. Government is the creature, the agent of the state. The state makes the constitution, both the constitution of liberty and of government, while the government makes the laws.

This constitution-making power, in our system, is lodged in the people of the United States, "We, the people of the United States," considered as a political unit.

It follows, hence, that the so-called states in our system are not sovereign; that they exercise no sovereign powers, but local governmental powers; that Colorado, therefore, not being independent, must act under some authority, and that the only authority superior to her is the "People."

1 & 2 Burgess, supra.

1 Wilson's Works, 321-5.

McCulloch v. Maryland, 4 Wheat., 403-4.

Davis El. Inter. Law, 32-3.

Black Const'l Law, 16-26.

Farrar Man'l Const., 37.

2 Curtis Const'l Hist., 520-1.

Bliss on Sovereignty, 73-4.

2 Curtis Const'l Hist., 71-4.

Martin v. Hunter, 1 Wheat., 304, 324.

Von Holst Const. Law U. S., pages 39-44.

Justice Miller's Lectures on Const., pages 38-58.

Abbott "Judge & Jury," supra.

Webster, Argument in Luther v. Borden, supra.

Woolsey, Inter. Law, sections 36-37.

Hence it follows that Colorado in amending her constitution exercised an authority under the United States.

II.

IN THIS CASE, (a) THE VALIDITY OF THAT AUTHORITY EXERCISED WAS ACTUALLY DRAWN IN QUESTION; (b) IT WAS DECISIVE OF THE CASE AND THERE WAS NO OTHER MATTER ADJUDGED BY THE COURT BELOW BROAD ENOUGH TO SUSTAIN THE JUDGMENT; AND (c) THE DECISION BELOW WAS AGAINST THE VALIDITY OF THAT AUTHORITY.

See opinion below, Record, pages 21-31.

The people of Colorado, by due process, enacted and promulgated amendment XX to their constitution. There has never been any pretense or issue that for any reason of form or procedure the amendment

is invalid. In accordance with this amendment, a charter was adopted. There has not been any pretense or issue that for any reason of form or procedure this charter is invalid. There could be none. There was no question of statutory construction here. There could be none. The terms of the charter are all too clearly within the limits of the amendment for this. Such being the fact, no untenable construction can be resorted to to defeat the jurisdiction of this court. (Terre Haute R. R. Co. v. Indiana, *194* U. S., 579, opinion by Holmes, J.). Since the charter was within the amendment and the amendment duly adopted and promulgated by the people, it would seem that both were law in Colorado, *unless for some reason the people of Colorado had no power to make this amendment to their constitution.*

This was the sole ground of attack; the sole question litigated; the sole question that *could* have been raised here; and it was the sole ground of decision by the court, which held the amendment invalid as being in conflict with article IV, section 4, of the constitution of the United States, that is—the court decided against the validity of an authority exercised under the United States, to wit: the authority of the people of Colorado to amend their constitution by adopting amendment XX.

III.

THE QUESTION HERE IS A JUDICIAL QUESTION; IT IS NOT ONE FOR THE POLITICAL DEPARTMENTS OF GOVERNMENT, BUT IS PROPERLY IN THIS COURT FOR DECISION.

Luther v. Borden, 48 U. S., 1, 34.
Taylor v. Beckham, 178 U. S., at 571-2.
Boyd v. Thatcher, 143 U. S., 135.
Kennard v. Louisiana, 92 U. S., 480.
In re Duncan, 139 U. S., 449.
Texas v. White, 7 Wall., 700.
Gunn v. Berry, 15 Wall., 610.

Luther v. Borden, 48 U. S., 1, 34, is not a precedent opposed to this. There the question was whether the revolutionary government of Dorr had, for a period before 1843, superseded the government that had been recognized since Charles II. as the legitimate government of Rhode Island. The Dorr government was based on a constitution framed by a convention elected without the sanction or pretense of sanction of any law. It was purely extra-legal. It was the product of a popular uprising for suffrage reform. It was purely revolutionary, because it had no basis in law. Dorr and his friends claimed no justification in any law but "natural law"—the inherent right of a population (as they expressed it) to rise up, when dissatisfied, overturn existing government and form government to suit themselves. The question in Luther v. Borden, then, was whether this revolution-

ary constitution and government had overturned the then existing government in Rhode Island.

There was no question there whether the form of either government was republican. There was no question whether any provision of the federal constitution had been violated. These questions were not even hinted at in argument or opinion. The sole dispute was whether a revolutionary government could be the legal government. This court held it had no jurisdiction to answer, because it belonged to the political departments of our central government to decide which of two contending governments, whether foreign or at home, is the legitimate one, and to decide whether in any territory there is government or not.

This decision makes Luther v. Borden authority for the proposition that government in our so-called states is an authority exercised under the United States, since without the recognition of the political departments of the United States there can be no government in them at all that can participate in our federal system—no representatives, no senators, no appeal to this court.

But the court also held that the political departments having once recognized a local government in a so-called state as legitimate, it was binding on all departments of government, on the other so-called states, and even this court.

In this case at bar there is no issue over the legitimacy of the governmental establishment in Colorado. The government in Colorado is the constitutional, legitimate government there. The political departments have recognized it as such, do now. This court must, then (Luther v. Borden), recognize it as such.

The question here is whether an act of that recognized, legitimate government violates a provision of the constitution of the United States.

What the framers of the federal constitution meant by the phrase, in article IV, section 4, "republican form of government," is purely a judicial question—one of legal interpretation and construction. This court is made by our constitution the interpreter thereof (Constitution, article III, section 2). Those authors must have had a distinct set of ideas in mind when they used the phrase. Whether what the recognized government in Colorado has done is in harmony or out of harmony with those ideas, is also a judicial question, because it also is one of legal interpretation and construction.

"But when the trial is in the courts, it is a case; and, if a defense is interposed under the constitution or laws of the United States, and is overruled, then * * * this court has jurisdiction."

Taylor v. Beckham, 178 U. S., 548, at 571.

They are questions that congress and the executive, by their very character, can not answer. They must come to this court. They are referred to it by the constitution itself.

Taylor v. Beckham, 178 U. S., 548, is not a precedent opposed to this. This case arose out of the contest in 1899-'90 over the governorship of Kentucky. The election was contested. By the constitution and laws of Kentucky the general assembly was the exclusive judge of the contest. They sat and heard the contest; they decided. There was no contention whatever that the government in Kentucky was not repub-

lican in form. (See page 574.) There was no contention that any provision of the Kentucky constitution or any law of Kentucky, or any procedure or process authorized by the government of Kentucky violated the republican form. (See page 574.) The complaint was that the general assembly gave corrupt judgment; and that this dishonest judgment tended to violate the republican principle. Because their complaint was simply that their officials had acted dishonorably, this court (page 580) referred them to the "august tribunal of the people" of Kentucky for redress. Of course, every dishonest act in office violates the republican principle, but would not give this court jurisdiction. The constitution guarantees a government that is republican in form, i. e., organized after a republican pattern. There process and procedure were republican in form; so no question under the constitution arose. This provision (article IV, section 4) authorizes a look into the *structure* of the government only.

True, in this case, the court said: "It was long ago settled that the enforcement of this guarantee (republican form) belonged to the political department" (page 578), and cited *Luther v. Borden*. But this was clearly a hurried comment and pure *dictum*. As shown above, *Luther v. Borden* did not settle any such thing, and the learned court's statement of what was there decided (pages 578-9) shows that it (*Luther v. Borden*) was not at all in point with *Taylor v. Beckham* because there was no contest in Kentucky between two governments and no question at all as to the validity of her constitution or laws. (Page 574.)

IV.

THE WHOLE OF THE ABOVE VIEW AS TO THE NATURE OF SOVEREIGNTY, THE CHARACTER OF A STATE, AND THE RELATIONS EXISTING BETWEEN THE FEDERAL GOVERNMENT, STATE GOVERNMENTS AND THE CONSTITUENT POWER OF THE PEOPLE OF THE UNITED STATES, ARE WELL BORNE OUT BY OUR CONSTITUTIONAL HISTORY.

The articles of confederation preceded our constitution. They provided (Article II, that each state should retain its "sovereignty, freedom and independence." They provided, also (Article XIII, that the union should be perpetual, and that no alteration should be made in the articles of confederation unless such alteration be agreed to by a congress of the United States and afterwards confirmed by the legislatures of every state.

Any change in that fundamental law which did not proceed according to the formalities and receive the sanctions prescribed thereby was necessarily illegal—i. e., revolutionary. This was the character of our present constitution. It was the product of revolution, because it was not authorized by and adopted according to any existing law. It changed not only the whole frame, but the very fundamental principles of our national organization.

The convention which framed our constitution was only authorized to propose amendments to the articles of confederation. It the authority given really went further than this, still it contemplated

ratification in the legal manner. No other authority could have been granted. Any other would have been extra-legal. Instead of proposing amendments to the articles, the convention constructed an entirely new document. It disregarded the mandate of the articles of confederation as to ratification; disregarded the authorities of the legislatures of the states to sanction; and passed the document on to conventions of the people themselves, *as the original source of power and the real sovereign of the nation*, for ratification.

Moreover, it prescribed a revolutionary mode, namely, that the ratification of conventions in nine states should establish the new government. That is to say, in violation of the articles of confederation, not only was a *new government to be established* on the American soil; but, in violation of the same sacred law, *the government then existing was to be torn down*. This certainly was revolutionary. As matter of history this is exactly what happened. Before the conventions in all the states had ratified the constitution the old government was destroyed and the new government was set up.

This revolutionary power which proceeded thus and tore down the existing government and established a new government *in spite of existing law*, and imposed its will, through our present constitution, upon the whole body of the people of the United States, irrespective of the geographical divisions in which they happened to reside, was the sovereign, the supreme power of the land; and no one nowadays, at any rate, will dispute that that power emanated directly from the people of the United States, considered in their collective capacity.

Acting, as they were, outside of the limitations of law, necessarily they were supreme and unlimited in power, for only the prescripts of law can impose any limitation upon a political organization. Such self-imposed restrictions as prudence might dictate are not, in public law, limitations at all. This power, then, exercising its free will, without limitation, capable of prescribing whatever it pleased as to the governments, national and local, authorized a federal system by which certain governmental powers were to be exercised by the people in their local divisions, and other more general governmental powers should be exercised by a central government over the whole territory of the United States. It will be noted, too, surely no student of our constitution will deny this, that this same power to this day, should it so will, could, *by the mere process of amendment*, change the construction of the local governments in the various states to suit itself, or of the central government either. If such change were incorporated in our constitution, and any state objected thereto, its only recourse would be to resort to war in defense of its supposed rights; when it would be either speedily subjected to the ruling power, or, being joined by other dissatisfied states, draw to itself sufficient strength to overturn the existing government and to establish a new government upon a new principle of sovereignty.

This was what was attempted during the civil war. There never had been a "compact" or "agreement" between sovereign states under our constitution, as is shown by the above historical outline. The states were absolutely subject to the political power of the people of the United States. Those states

which disputed this went to war. They were subjected. This established the principle here contended for. After the war the constitution was amended without their participation even, and without their sanction, though they were afterwards brought back into the union by the supreme power of the land. This principle was further enforced by the reconstruction acts of congress and the reconstruction administrations in the southern states, including anti-slavery amendments to their local constitutions forced upon them.

The real lesson of the civil war is that the people of the United States are sovereign; that their power is absolute and supreme, and that the states are merely local government operating under and by the authority of the United States.

Art. of Confed., articles II, XIII.

Const. U. S., article VIII.

1 Burgess Pol. Sci. and Comp. Const. Law, pages 67, 98-108.

McLain, Const. Law, pages 32-3.

Flanders Const. U. S., pages 34-6.

Farrar, Manual Const., Ch. 39, section 569 et seq.

Webster, Argument, *supra*, pages 564-5.

Walker, "Making of Nation," pages 20-30, 37-8.

Burgess, "Reconstruction & the Const." (discussing the state in the federal system), Ch. I et seq.

1 Curtis Const'l Hist., pages 364-5, 367.

McCulloch v. Maryland, 4 Wheat., 316, 404.

Gibbons v. Ogden, 9 Wheat., 1, 187.

Dred Scott v. Sanford, 19 How., 393, 441.

V.

THE WHOLE OF THE ABOVE VIEW IS ALSO JUSTIFIED BY AN EXAMINATION OF THE CONSTITUTION OF THE UNITED STATES. IT IS THE ONLY VIEW THAT *IS* JUSTIFIED BY THE CONSTITUTION. ON NO OTHER THEORY CAN ALL OF THE PROVISIONS OF THE CONSTITUTION BE RATIONALLY CONSTRUED.

The preamble states "We, the people of the United States," ordain the constitution. This cloaked a new idea—that the people of the United States irrespective of their local geographical lines had a political entity. The people then proceeded to devise our scheme of government. They prescribed carefully what powers the congress should exercise, and what it should not exercise. They prescribed with care what the executive department should be and what powers it should exercise and what powers it should not exercise. They prescribed with care what the constitution of the judiciary should be, and what powers it should exercise and what powers it should not exercise. They proceeded carefully to prescribe what the local governments in the states should be, what their form should be (republican), and what powers they

should exercise and what powers they should not exercise. The people did all this, and it was nothing more than their resolution, formally expressed, that these things should be as written down, that they have so existed from that day unto this, and now are.

Chisholm v. Georgia, 2 Dall., 419, at pages 449; 457.

Id., Justice Jay, at pages 470-1.

Ware v. Hylton, *supra*, at pages 236-7.

1 Davis, "Rise & Fall Confed. Govt.," at page 155.

Webster, Speeches, 8th Ed., volume II, pages 174-6.

VI.

ARTICLE XX OF THE CONSTITUTION OF THE STATE OF COLORADO AUTHORIZED THE CITY AND COUNTY OF DENVER BY ITS CHARTER TO CREATE THE OFFICE OF TREASURER, AND TO IMPOSE UPON THE INCUMBENT THEREOF THE OBLIGATION OF PERFORMING THE ACTS AND DUTIES REQUIRED OF A COUNTY TREASURER TO BE PERFORMED UNDER THE CONSTITUTION AND GENERAL LAWS OF THE STATE, AND IN THE EXERCISE OF SUCH AUTHORITY THE GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT BY THE CONSTITUTION OF THE UNITED STATES HAS BEEN IN NO WISE DISTURBED OR VIOLATED.

Article XX created the city and county of Denver. It carved a piece of territory out of a pre-existing subdivision of the state, and named it the city and county of Denver, and declared it to be a single body politic and corporate. The constitution then consolidated the portion of the old county thus carved out, the former city of Denver, and some half dozen outlying towns. Section 3 of said article provides for the transfer of government from the old entities into the new, and provides for the temporary government of the city and county during the time that must elapse between the proclamation announcing that article XX had been adopted, and the time when officers of the city and county would be elected after the adoption of a charter.

Nothing could more forcibly illustrate the purpose respecting the consolidation of the city and county than the section mentioned. It not only consolidated into one entity the county and the municipalities aforesaid, but the agencies of government within said territory as well. It was not the purpose in thus consolidating the agencies of government essentially to change the government itself. Governmental functions appertained to said territory after the promulgation of article XX no less than had been the case throughout the previous history of the state. What the constitution did was merely to change the machinery by which the governmental functions were to be performed. There had always been a sheriff in each county of the state. The constitution had required it; but within the city and county of Denver, and during the interval between the promulgation of article XX and the adoption of the charter, the constitution—not the legislature, but the constitution itself—expressly provided that there should be no sheriff. The constitution did not say that those duties attaching to the office of sheriff should be abolished within said territory; it did not say that the functions of government required by the constitution and general law of the state to be performed by sheriffs should cease to exist; but it did declare that the man who had been the chief of police of the old city of Denver should become the chief of police of the city and county of Denver, and should be *ex-officio* sheriff. Here is a clear case of the imposition by the constitution itself upon a municipal officer of county duties and county functions.

During this same period the council of the old city of Denver, the constitution declared, should be

the council of the city and county of Denver. This council was also required to perform the duties of a board of county commissioners. The duties imposed by the constitution and general law of the state upon boards of county commissioners were not abolished within the city and county of Denver; but the constitution did change the agency by which those duties were to be performed. Thereafter and until other provision was made those duties and functions were to be performed by a city council.

The engineer of the old city of Denver was declared to be the engineer of the city and county of Denver, and the constitution also declared that he should be *ex-officio* surveyor. The duties imposed by general law upon surveyors were not affected. They were simply transferred to a different official.

The clerk and ex-officio recorder was to become such officer for the city and county of Denver. A city clerk as such was no longer a necessity; but the clerk and ex-officio recorder of the old county of Arapahoe became that officer of the city and county of Denver, and also assumed the duties previously appertaining to the city clerk.

The treasurer of the old county became the treasurer of the consolidated city and county, thus dispensing with the official who had formerly been the city treasurer.

In making this distribution, as will appear from an examination of the language of section 3, supra, the people seem to have taken unusual care to avoid separating into distinct classes those officials who would perform county functions, and those who would perform city functions; but upon city officials, with municipal duties, other functions usually appertain-

ing to the county were imposed, and upon county officials, with ordinary county functions, other duties usually appertaining to the city were imposed, showing clearly a purpose to consolidate into a single agent duties previously imposed upon two or more agents.

So it is palpable from an examination of section 3 of article XX that there was a real consolidation and merger, not only of previously existing municipal and quasi-municipal entities, but of the governmental machinery by which the duties for the several pre-existing entities had been performed.

We concede, as we have always believed, that the city and county of Denver, viewed in certain aspects, is still a county, whereas, viewed in other aspects, it is purely a city. We recognize that the city and county of Denver is one of the legal subdivisions of the state. As such, and wholly apart from its government locally as a city, it must be possible to secure juries, to levy and collect taxes, to probate wills, to collect executions under the general law, and to have performed all of those functions of government necessary to the preservation of the integrity of the state. We do not contend that article XX has destroyed any of the public functions or duties respecting the state and county governments; what we do contend is, that article XX did change the manner and method of selecting the functionaries whose duty it should be to perform the governmental functions ordinarily attaching to county officers.

Probably the spectacle of a chief of police acting as a sheriff had not been witnessed hitherto in this country. Those who are unduly partial in favor of the old, and who are prejudiced against innovation,

could not see how it would be possible for a chief of police to summon jurors or collect an execution. These duties have usually been associated with a sheriff; but that does not mean that the supreme power in the state—the people thereof—may not sever them.

A moment's candid reflection discloses that a function is one thing, and a functionary is a different thing; that an agent is one thing, the duty of the agent is a different thing; that an officer is one thing, the obligation of the officer is a different thing.

Herein lies the fallacy of relator's contention; he utterly fails to discriminate between the function and the functionary, between the agent and the duty imposed upon the agent, between the officer and the obligations of the officer.

We have never contended, and do not now contend, that a single governmental duty, by the adoption of article XX, became subject to local control. During the interim for which the provisional government was made in section 3, the governmental duties in this territory were not different from what they had been before—not different from what they were in other subdivisions of the state. The constitution did not attempt to change these duties; they were not changed, but the obligation of performing them was simply imposed upon the officials in section 3 designated. The state could not suffer, because all duties appertaining to a sheriff, a board of county commissioners and a surveyor, as those terms are usually understood, were to be performed by a chief of police, a city council and a city engineer. The point with the people was to have those duties performed. It was wholly immaterial as to the name by which the functionaries were to be designated.

Now, what section 3 did during the provisional government, and prior to the adoption of a charter under article XX, is merely indicative of what section 2 of article XX declares may be done for the entire future government of the city and county of Denver. Section 2 is as follows:

"The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided: but every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable. If any officer of said city and county of Denver shall receive any compensation whatever, he or she shall receive the same as a stated salary, the amount of which shall be fixed by the charter, and paid out of the treasury of the city and county of Denver in equal monthly payments."

If there ever was a constitutional provision which is so plain as to need no explanation, so unambiguous as to need no interpretation, it is this section 2. In dealing with it, we most earnestly invoke the court to apply the rule of construction announced in *Board of County Commissioners v. Rollins*, 130 U. S., 662.

Applying this rule, no room is left for construction of section 2, *supra*. It means what it says. No other construction is possible. Counsel, however, insist that the court shall read into this section, after the words, "city and county of Denver," the words, "in its character as a city." This destroys its mean-

ing, and is utterly inconsistent with the plan of government instituted by the constitution at the time of the creation of the city and county. If such meaning was to be given to section 2, upon what theory can the action of the people be explained in bringing to an end the terms of office of the old county officials? If relator's contention is correct, why did not article XX continue intact and to the end of the term the old county officers for the new entity, and why did it not simply provide that the city officials of the old city of Denver should become such officials for the city and county in its character as a city until a charter should be adopted and new officers elected thereunder? The contention of counsel is absurd, and convicts the people of being insane in providing for the *ad interim* government as set forth in section 3 of article XX.

Again, what is meant by the language, "*but every charter shall designate the officers who shall respectively perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable?*" This clause must be eliminated if counsel's contention is maintained, and by the decision of the supreme court of Colorado it has been absolutely eliminated. The use of this language demonstrates two propositions—first, that the acts and duties, required of county officers to be done by the constitution and by the general law, will still prevail and must still be performed in the city and county of Denver; second, that there will be no county officers to perform them as the term, "county officers," is usually understood. Because these duties must still be performed, and because there will be no

county officials to perform them, we have the mandatory declaration in the constitution that every charter shall designate the officers who shall respectively perform such acts and duties. Nothing could be more convincing of the proposition that there will be no county officers, as that term is popularly understood, in this territory, than this language. It equally emphasizes the proposition that those duties still appertain within this territory. They must still be performed in the future as in the past; but they are not to be performed by the same agencies that have hitherto performed them, or by agencies selected at the same time or in the same manner. The charter of the city and county of Denver must designate of its officers those who shall perform these duties. It was the performance of the duties in which the people were interested, and not in having them performed by any particular agent, or by an agent selected at any particular time. Section 2 says the officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter, and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided. Then is added this qualification or limitation, namely, that every charter shall designate the officers who shall respectively perform the acts and duties required of county officers to be done by the constitution or the general law, as far as applicable.

This language either means that the officers of the city and county are to be provided for by a charter, and that this charter shall designate of those officers those who shall perform the various govern-

mental functions imposed upon county officers, or else language ceases to have any meaning at all. It means that or it means nothing. Why designate officers of the city and county to perform the duties of county officers if it was intended that county officers in this territory were to be elected in the usual way? There is no possibility of giving any meaning to this section other than that naturally expressed by the words used.

This argument the court below was unable to and did not attempt to answer. The court, therefore, if not in express words, in effect, nevertheless, declared section 2 void upon the ground that if it meant what it said, it would destroy a republican form of government in the city and county of Denver, and that if it meant what it said, the people of the state of Colorado did not have the power or authority, under the constitution and laws of the United States to enact such a constitutional provision. It is not a case of the *construction* of said section; it is a case of *annihilation*. The court in effect says that section 2 can not stand as it is written, because it destroys a republican form of government. If the people of Colorado should amend their constitution so as to abolish the supreme court, that tribunal, under the guise of construction, might declare that such amendment can not stand because, forsooth, to abolish the supreme court of the state of Colorado would be to destroy a republican form of government in that state. Such action could hardly be more absurd than the decision below, which eliminates from the constitution a section which, under the constitution of the United States, the people of Colorado had the power and right to adopt as a part of their organic law.

The supreme court of Colorado, we think, does not seriously controvert the proposition that section 2 means what it says, and that its language clearly authorizes the charter to designate and fix the term of the official who shall perform, in the city and county of Denver, the duties imposed by the constitution and general laws upon county treasurers; but, as we understand the opinion, the court insist that, to give section 2 the meaning which it thus clearly expresses, will be to give it a meaning which will render it invalid. In other words, the court insists that in the city and county of Denver a republican form of government must be maintained, and that to maintain a republican form of government in said city and county, a meaning must be given to section 2 which is different from that expressed by the language in said section used. If section 2 means what it says, counsel for relator argued that in this particular subdivision of the state a republican form of government would pass away. The only alternative is to declare that said section has no meaning—to declare it utterly void.

Until we heard in the lower court this particular contention on the part of learned counsel, it had never occurred to us that the existence of a republican form of government in any wise depended either upon the day that officers are selected by the people to perform the functions of government, or the particular name which should be given to the officers so selected for that purpose. It seemed immaterial, so far as the maintenance of a republican form of government is concerned, whether officials for a subdivision of the state are elected on the first Monday in August, the first Tuesday in November or in the month of

May. A republican form of government is maintained in some states where in each subdivision thereof a board of county commissioners is elected to control the fiscal affairs of the county. A like form of government is maintained in other states where in each subdivision thereof there is constituted what is known as a fiscal court, to control the fiscal affairs of the county. In some states these officials have been elected in August, in others they have been elected in November. In some they are elected for two years, in others for four years. In some parts of this country the subdivisions of a state have been called townships, in others the subdivisions of the state have been caled counties; but in all of the states in this country the supreme power of the state has been and is in the people, subject only to the limitations of the federal constitution, and so long as the supreme power is thus vested, respecting the whole territory of a particular state, it is not believed that a republican form of government is endangered.

In the early history of our government little attention was given in the state constitutions to local government. In the North there existed the New England town; in the South the Virginia county, while in other states a combination of the two existed. The evolution of government, particularly for local purposes, is reviewed at some length and in a most interesting manner by *Thorpe in his Constitutional History of the American People*, volume 2, beginning at page 448. The author in his discussion discloses that Illinois in 1848 incorporated in its new constitution an article on the subject of counties, which he says is the first innovation of this kind. At page 453, he says:

"It left the form of government to the will of the electors. They might choose the township or county type."

The author at page 453 continues:

"What form of local government would prevail in California was for a time uncertain. That it would be composite was assured. The New England township, the Virginia county, the Pennsylvania combination of township and county, and the old Spanish system of local government were the elements to be harmonized. The form was left to the decision of the legislature. A significant change was made in Virginia at this time by the subdivision of each county into districts as nearly equal as possible in territory and population, in each of which four justices of the peace were elected for four years and commissioned by the governor. These comprised the county court. The voters of each county also elected a clerk, surveyor, commonwealth attorney, a sheriff and revenue commissioners. It will be noticed that the recognition of local interests in a southern state constitution was chiefly of judicial interests, and usually by means of a reorganization of the judicial system of the state. On the other hand, in northern states the recognition of local government was chiefly in its administration by supervisors or commissioners—the recognition of the county or town as a distinct body corporate. This difference is well illustrated in the constitutions of Virginia and Michigan of 1880. Virginia recognized the county no further than as a basis of representation and as entitled to separate courts. Michigan organized it as a body corporate, whose economic interests comprised an organic unit. No county could have fewer than sixteen towships, each six miles square, as surveyed by the United States, unless in pursuance of law, and with the consent of a majority of the electors residing within the county.

The legislature might organize any city into a separate county when it attained a population of twenty thousand inhabitants, and without reference to its geographical extent, if a majority of the electors of the county in which the city was situated favored separate organization."

This probably presents the first instance of a plan for the consolidation of a city and county in any of our state constitutions. The scheme has been tried in Missouri and California, and in Washington there is constitutional authority for certain cities to make their own charters. It is upon the authorities of the courts of these three states that counsel essentially relied in the court below. To review the various decisions of these states would unduly extend this discussion.

With the propositions established thereby we have no controversy. Generally we believe they are correct. The provision of the Colorado constitution, however, is essentially different from anything found either in the Washington or Missouri constitutions. The scheme of a consolidated city and county government, however, was embodied in the Missouri constitution, and to that extent, as well as to the extent that provision was made for the separate government of such consolidated city and county, the constitution of that state is not essentially different from the recent amendment to the constitution of the state of Colorado. The portions of the constitution of Missouri thus providing for the consolidation of the city and county government are found in article IX thereof.

The decisions of the supreme court and court of appeals of Missouri which discuss said constitutional provisions are as follows:

State v. Mason, 4 Mo. App., 377.
State v. Finn, 8 Mo. App., 341.
State v. McKee, 69 Mo., 504.
State v. Dillon, 87 Mo., 487.
State v. Bus, 135 Mo., 325.
Kansas City v. Oil Co., 140 Mo., 458.
State v. Police Commissioners, 80 Mo. App., 206.
State v. Lindell Ry. Co., 151 Mo., 162.

Article X of the constitution of the state of Washington presents constitutional authority for the organization of cities, and constitutional authority for certain cities to make their own charter—something of an innovation from the general rule whereby municipal charters are enacted by the state legislature. It is plain, however, from an examination of the said provision of the constitution, that a discussion of no question which could be presented thereunder, can materially aid us in arriving at a conclusion respecting the question in issue. Said constitutional provision, however, is discussed in the following cases:

In re Cloherty, 2 Wash., 137.
City of Tacoma v. State, 4 Wash., 64.
Howe v. Bartow, 12 Wash., 627.
State v. Superior Court, 14 Wash., 604.

Prior to the amendment to the constitution of the state of California in 1896, there was no provision in the constitution of any of these states similar to article XX, and no decision rendered in any of said states prior to 1896 can have any controlling effect upon the real question now in dispute. That a consolidated city and county is both a *city* and a *county*, all of these courts agree. With this position we have no controversy whatsoever. That fact in no wise destroys a republican form of government.

The authorities from the states above mentioned also go to the point that the governmental functions must be performed in the territory embraced by a consolidated city and county as in all other subdivisions of the state. They also establish that the powers of a municipality are such as have been expressly conferred or such as have been conferred by necessary implication.

This brings us to the constitution of the state of California.

The city and county of San Francisco began its existence as a consolidated entity, as we understand it, originally under an act of the legislature of 1856. The constitutional convention of 1878-79, however, made provision for the government of cities. Section 5 of article XI declares:

"The legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office. It shall regulate the com-

pensation of all such officers in proportion to duties, and for this purpose may classify the counties by population; and it shall provide for the strict accountability of county and township officers for all fees which may be collected by them, and for all public and municipal moneys which shall be paid to them, or officially come into their possession."

Section 6 is as follows:

"Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

Section 7 is as follows:

"City and county governments may be merged and consolidated into one municipal government, with one set of officers, and may be incorporated under general laws providing for the incorporotion and organization of corporations for municipal purposes. The provisions of this constitution applicable to cities, and also those applicable to counties, so far as not inconsistent, shall be applicable to such consolidated government. In consolidated city and county governments of more than one hundred thousand population, there shall be two boards of supervisors or houses of legislation—one of which, to consist of twelve persons,

shall be elected by general ticket from the city and county at large, and shall hold office for the term of four years, but shall be so classified that after the first election only six shall be elected every two years; the other, to consist of twelve persons, shall be elected every two years, and shall hold office for the term of two years. Any vacancy occurring in the office of supervisor, in either board, shall be filled by the mayor or other chief executive."

Section 8 authorized any city containing a population of more than three thousand five hundred to frame its own charter in the manner in said section specifically set forth.

It would, perhaps, be proper to observe that some sections above referred to were slightly amended from time to time, but not in a way to be material to the question under discussion. We have referred to the sections as they existed in 1893. Section 8, as we are advised, originally applied only to cities having a population of more than one hundred thousand. Of course, we do not now refer to the amendments of 1896, which we shall here after discuss.

All of the cases cited below for relator from California, except *Martin v. Election Commissioners*, 126 Cal., 404, and *Crowley v. Freud*, 132 Cal., 440, were decided at a time when there was no constitutional provision on the subject in California, or when the provisions were substantially as above set forth.

Numerous previous cases are reviewed at considerable length in *Kahn v. Sutro*, 114 Cal., 316. That action was instituted to restrain the board of election commissioners of the city and county of San Francisco from calling an election for county officers. It was contended that the county government act of 1893 had

no application to the city and county of San Francisco. A demurrer was interposed to the complaint and sustained. It will be noted that section 6 above quoted expressly declares that all charters framed or adopted by authority of the constitution shall be subject to and controlled by general laws. The point was as to whether the general law of 1893, respecting county governments, applied to the city and county of San Francisco. A majority of the court held that it did.

In other words, as the constitution then existed, there was no authority in the city and county of San Francisco to fix the time at which or the term for which county officers should be elected. The court held that the city and county of San Francisco was a municipal corporation, but, viewed in certain aspects, was a county as well. It was argued with a good deal of force, and to the extent of convincing the chief justice and one of the associate justices, that section 7, which provided for one set of officers, authorized the city and county, in its charter, to provide for the time at which county officers should be elected; though, as stated, the majority of the court held that the clause in section 6, which declared that all charters, framed under the authority of said article, should be subject to and controlled by general laws, left the city and county of San Francisco subject to the provisions of the general county act aforesaid, respecting the election of county officials.

A somewhat similar question was before the supreme court of California in *People v. Toal*, 85 *Cal.*, 333, where it was held that article XI of the constitution did not confer authority upon a consolidated city and county, in its charter, to establish a police court.

These decisions and others therein cited led the legislature to propose, and the people to adopt, an amendment to article XI, designated as section 8½ thereof. This amendment, so far as applicable to the question under consideration, is as follows:

"It shall be competent in all charters framed under the authority given by section 8 of article XI of the constitution to provide, in addition to those provisions allowable by this constitution and by the laws of the state, as follows: 1. For the constitutional regulation, government and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which, the judges of such courts shall be elected or appointed, and for the compensation of said judges and of their several clerks and attaches. * * * Where a city and county government has been merged and consolidated into one municipal government, it shall also be competent in any charter framed under section 8 of said article XI to provide for the manner in which, the time at which, and the terms for which the several county officers shall be elected or appointed, for their compensation, and for the number of deputies that each shall have and for the compensation payable to each of such deputies."

In some material respects it will be noted that this amendment is like certain provisions of article XX of the constitution of Colorado. Section 2 of article XX goes a step further in that, instead of expressly providing for county officers to be elected in the city and county of Denver at such time and for such term as the charter may provide, it declares that the *officers themselves shall be such as the charter may provide for.* Section 8½ *supra* delegated to the consolidated city and county in California the power

to provide the time and manner of election, and the term for which county officers should be elected, thus recognizing the officials still as county officers, but making them different from other county officers throughout the state in that their term was to be fixed for a short period or a long period, in the discretion of the city and county; their compensation, instead of conforming to that received by other county officials throughout the state, might be greater or less, as dictated by the city and county; and, instead of being elected in the same manner that other county officials were elected throughout the state, the method was delegated to the city and county. In other words, every matter of detail in securing county officials, such as fixing their compensation, and the time for which they should serve, was delegated by the people of the state of California to the consolidated city and county.

It is apparent from a mere statement of the proposition, that while certain officers of the consolidated city and county were called county officers, they were not, in truth, county officers, in the *same sense* as were other county officials in the various subdivisions of the state. They had to be called county officials, because section 8½ so declared, and they were county officials in the sense that they *performed the governmental functions* ordinarily imposed upon county officials under the constitution and general law of that state; but they were in a class of county officers by themselves, different from all other county officers, in respect to the method of their election, the term of their service, and the compensation which they should receive; but they performed the duties ordi-

narily attaching to county officers and, in this sense, as well as in name, were county officers.

Section 2 of article XX secures to the people of the state of Colorado the same result, so far as the government is concerned, as that attained by section 8½ of article XI of the constitution of California. The city and county of Denver is authorized to give to its officials whatever name it may see proper, to elect them for such term as its discretion dictates, pay them such compensation as the condition of its exchequer may justify, elect or appoint them at such time as the charter may fix, prescribe such qualifications as seem proper; but, to the powers thus conferred, is attached one limitation, and this limitation has precisely the same practical effect in the state of Colorado as was had by that part of section 8½ in California, which expressly provided for the election of county officers. The limitation referred to declares that *every charter shall designate from among the officers of the city and county those who shall respectively perform the acts and duties required of county officers to be done by the constitution and general law, as far as applicable.*

It is the public duties fixed by the general law, the public functions imposed by law and existing throughout the state, that are not subject to local control, and that they are not subject to local control is positively shown by this clause in section 2, which requires the city and county, in its own way, at such time as seems proper, for such compensation as it likes, but always, nevertheless, to designate officials of the city and county upon whom shall continually rest the obligation of performing these public duties and public functions.

It has not been customary, it is true, to delegate such authority to the people of a portion of the territory of a state; but that does not argue that it may not be done. It is an innovation, or would be so regarded in many states; but there is nothing revolutionary about it. Complete provision is made for the doing of everything, and for the performance of every duty required to be done or performed in any other portion of the state.

Since the adoption of section 8½ of article XI of the constitution of the state of California, two important cases involving its construction and validity have been before the supreme court of that state. We refer to *Martin v. Election Commissioners*, 125 Cal., 404, and *Crowley v. Freud*, 132 Cal., 440. An analysis of these cases will show not only that they support our contention, but that the previous cases, most of which are reviewed in *Kahn v. Sutro*, in no wise conflict therewith. It was because of the previous decisions, to which reference above has been made, that section 8½ was adopted. After its adoption provision was made in the charter of the city and county of San Francisco fixing the time for the election of all officers of the city and county, and it was expressly held in both of these cases that under section 8½ it was competent for the city and county to do what said section declared it might do, namely, to fix the times at which, and the terms for which, the several county officers should be elected. It was argued, however, that section 8½ was invalid, as being in conflict with other provisions of the state constitution and as being destructive of a republican form of government. This is in line with the argument of counsel in the case at bar.

In *Martin v. Election Commissioners, supra*, at pages 411 and 412, the court uses the following language:

"It is contended, however, on the part of the appellants that the provisions of said amended section 8½ under consideration can not be carried out, for the reason that it would conflict with the general law of the state establishing a uniform system of county and township government; in other words, that the law (and a freeholders' charter adopted as provided for in the constitution is a law of the highest grade) can not be passed, although in pursuance of express power granted by the constitution, because it may, perhaps, infringe upon some other law. The rule of construction invoked by appellants seems to be that a proposition in a law or constitution in reference to a particular matter is inoperative and void if it be inconsistent with the general provisions of said law or constitution. The direct opposite is the true construction in such cases.

"'The more specific provision controls the general, without regard to their comparative dates; the two acts operating together, and neither working the repeal of the other.' (*Bishop's Written Laws*, sections 112-26; *Desmond v. Dunn*, 55 Cal., 247; *Dwarris on Statutes*, 765; *Cooley's Constitutional Limitations*, 63; *Commonwealth v. Council of Montrose*, 52 Pa. St., 391; *Coxe v. State*, 144 N. Y., 396; *People v. Keller*, 157 N. Y., 97; *State v. Kelly*, 34 N. J. L., 75; *McGavisk v. State*, 34 N. J. L., 509; *State v. Inhabitants of Trenton*, 38 N. J. L., 64; *Crane v. Reeder*, 22 Mich., 323.)

"Under this rule of construction it would be immaterial whether the general county government act applies to the county of San Francisco or not; for although said new section 8½ of article XI may conflict with other sections of the same article providing for a uniform system of county and township govern-

ment, it would still be valid as to the particular cases for which it is intended, for in such cases the particular and the general both stand together—neither abrogates the other—the former furnishing the rule for the freeholders' charter, the latter for all other cases.

"But the act establishing a uniform system of county and township government does not, and never has, applied to the county of San Francisco, in the sense claimed by the appellants. The first section provides that the several counties of the state, as they now exist, and such others as may be hereafter organized, are bodies corporate and politic, and, as such, have the power specified in said act; among these are the power to sue and to be sued, to purchase and hold land within its limits, to make contracts, and purchase and hold such personal property as may be necessary to the exercise of its powers, to manage and dispose of its property as the interests of its inhabitants may require, to levy and collect such taxes as are authorized by law. The county of San Francisco, as already shown, since the passage of the consolidation act, has never, as such, owned or possessed any property or performed any of the acts of a corporate body. Further, the general law provides that 'each county must have a board of supervisors consisting of five members.' The county of San Francisco never has had such a board, or any board of supervisors, since the consolidation act. The general county government act also provides for justices of the peace and constables in the several townships of the county, and there are no justices of the peace or constables in the townships of the county of San Francisco, since there are no townships in San Francisco. *In fact, it is too obvious for question or argument that the general law establishing a uniform system of county government does not apply to the city and county of San Francisco.* Further, section 8 of article XI, as it now stands, declares that when said charter is approved as therein provided 'it shall become the charter of such city, or if such city be consolidated with a county,

then for such city and county, and shall become the organic law thereof, and supersede any existing charter, and all amendments thereof, and all laws inconsistent with such charter.' As the section originally stood it read: 'All special laws inconsistent with such charter.' The purpose of the amendment is in line with other amendments to the other sections of the article in question, *and would seem to remove all doubt that such charters are not subject to existing laws, whether general or special.*"

In Crowley v. Freud, *supra*, it seems to have been urged that *Martin v. Election Commissioners* overruled *Kahn v. Sutro*. The court disclaims having had any such intention, but explains that the difference in the two cases arises not because of a change in the view of the court, but because *Kahn v. Sutro* was decided before the adoption of section 8½, whereas *Martin v. Election Commissioners* was decided *after its adoption*. *Kahn v. Sutro*, therefore, may be regarded as the law in California when the constitution exists as it did prior to 1896; but *Martin v. Election Commissioners*, and *Crowley v. Freud*, declare what the law is under the existing amendment to the constitution. The court, in *Crowley v. Freud*, at page 442, says:

"The Martin case was brought by certain county officers in San Francisco, upon the theory that the adoption of section 8½ had not changed the law declared in Kahn v. Sutro as to the time of their election and their terms of office; and this court held in the Martin case that those things had been changed by section 8½, because it declared that it was competent to provide in the charter of a consolidated city and county government 'for the manner in which, the times at which, and the terms for which the several

county officers shall be elected.' This was the only question involved and the only question decided—the only question to which the minds of the court were directly called and upon which they directly acted. The contention of appellants is based mainly upon one or two expressions to be found in the opinion of the Martin case. One of these, and the main one, is as follows: 'But the act establishing a uniform system of county and township governments does not, and never did, apply to the county of San Francisco, *in the sense claimed by the appellants.*'

"This, however, is not saying that it does not apply *in any sense.* And what *was* the sense in which appellants in that case claimed such application? They 'claimed,' briefly stated, as follows: section 6 of article XI provides that all municipal charters shall be, except in municipal affairs, 'subject to and controlled by general laws;' county officers not being within the exception of 'municipal affairs,' the county government act, which provides for their election, time of office, etc., 'controls the provisions of the charter on that subject;' and section 8½ can be kept out of conflict with section 6 only by a construction which is stated in appellants' brief in the Martin case in this language: 'The only construction admissible, therefore, is that which renders section 8½ subject to section 6 by permitting a charter to provide for the appointment, election, tenure and compensation of county officers and their deputies, only *where there is no general law on the subject;* the charter to be superseded in that respect whenever a general law is adopted.' They also contend that section 8½ could not be legally adopted as an 'amendment,' and that what was attempted thereby could only be done through a general revision by a constitutional convention. And they argued that, for the foregoing reasons, and for many others which were urged, section 8½ is not an existing amendment, and therefore the county government act applies to San Francisco *for all purposes.* The above views of counsel show

the application of the county government act to San Francisco, 'in the sense claimed by the appellants.' But the court did not agree with these views, and held that section 8½ was a valid amendment, and that by its express terms it provides for the election and terms of office of the county officers of the city and county of San Francisco; and it is with respect to the contentions of appellants in the Martin case that the expression above quoted must be taken. And a somewhat broader expression in the opinion, following closely after the one above noticed, must be taken as subject to the same qualification as the first. It is nowhere in the opinion stated that there are no county officers in the city and county of San Francisco; on the other hand, it recognizes the existence of such officers, as section 8½ itself does. For instance, in the constitutional convention, Judge Hager, in replying to the objection that consolidated governments multiplied offices and increased expenses, said that the opposite was the result, and referred to the consolidated government of San Francisco as sustaining his position; and in the opinion of the Martin case, the following, from his remarks, is quoted: 'We have a sheriff who is sheriff of *the county* and of the city. * * * We have a tax collector and we have an auditor that acts *for both;* formerly, we had one *for each.*' Whether there were county officers in San Francisco was not a question in the Martin case, and there was no pretense of overruling *Kahn v. Sutro* on that subject; the only question involved was, When are *county officers* to be elected? and what are their terms of office? *Miller v. Curry*, 113 Cal., 644, is to the same effect as *Kahn v. Sutro.*

"The fact that in a consolidated city and county there is neither a separate county governmental organization, nor a separate city governmental organization, each distinct from and entirely independent of the other—as there is in ordinary counties and cities—was fully recognized in *Kahn v. Sutro* as in *Martin v. Election Commissioners.* There is no conclusive-

ness in the argument that there can be no county officers for a consolidated government, because to hold otherwise would be to violate the original section 4 of article XI of the constitution, which contemplates a 'uniform system of county governments; for other provisions of the constitution, mostly amendments, and particularly section 8½, which are specific provisions on the subject, allow such want of uniformity in the case of a consolidated city and county government, and expressly apply provisions to county officers in such consolidated government which do not apply to officers in other counties.

"Not only is the state itself interested in county officers as parts of its necessary governmental machinery, but the people of any county of the state are interested—and some of them are frequently deeply interested—in county officers, such as sheriffs, recorders, clerks, etc., in other counties. The functions of such officers are general, not municipal. *And while, in the American system of state governments, the people of the whole state have generally kept in their own hands control over such important public governmental agencies as county officers; still, if they choose to yield up part of that control by adopting a constitutional amendment such as section 8½, there is no apparent reason why they may not do so, unless the amendment should be so revolutionary as to be destructive of a republican form of government, as the same is understood in this country. Section 8½ can not be said to be of that character.*"

Neither can it be said that section 2 of article XX is of that character. However unusual it may be in the history of our state governments, there is nothing destructive of a republican form of government in such delegation of power. It is plain that the officers designated, as appellee has been, to perform governmental duties are as truly state agencies when

in the performance of those duties as is any county official when performing like duties. A study of this opinion will show that in reality the same powers were conferred upon the consolidated city and county in California as are conferred in the city and county of Denver—the power to fix the manner of election, the term of office and the compensation of those officials who should perform county duties. It is true that the language of section 2 of article XX would authorize the city and county of Denver to follow the example set by the people of the whole state in section 3, and give to the officials who perform county functions a different name from that which prevails throughout the state, and we have no doubt at all that it was perfectly competent for that to be done; but as a matter of fact it has not been done, so far as the case at bar is concerned. The official who performs the acts and duties required of county treasurers under the constitution and general law of the state is called the treasurer of the city and county of Denver. He performs the duties imposed upon county treasurers by the constitution and general law of the state. He does this in obedience to a provision of the charter itself enacted in obedience to the mandate of section 2 of article XX.

If these duties, common to every portion of the state, are performed, the government is kept intact; its integrity is maintained; its republican form continues; and it is not material when such officials are elected, for what term they are elected, what compensation they receive, or by what name they may happen to be designated.

Let it never be forgotten that a clear discrimination exists between the function and the functionary;

between the office and the duty pertaining to the office. This distinction is not a mere metaphysical abstraction. It was clearly expressed by the people of this state when, in section 3 of article XX, they called the officer who should perform the duties of sheriff a chief of police, when they called the officers who should perform the duties of a board of county commissioners the council of the city and county of Denver, when they called the officer who should perform the duties of a surveyor for said city and county of Denver an engineer; and the distinction was clearly recognized in section 2 of article XX when the people of the state declared that the city and county of Denver should have just such officers as by election or appointment it should provide for in its charter; and when in another clause of section 2 it was declared that from among the officers so to be selected the charter should always designate those who should perform the acts and duties required of county officers under the constitution and general law of the state.

The supreme court of Colorado seems to have assumed that the existence within a state of what it terms an *imperium in imperio*, would *ipso facto* destroy a republican form of government. One of the reasons apparently assigned by the lower court for holding that it was not within the power of the people of Colorado to amend their constitution by the adoption of article XX, and particularly section 2 thereof, is that the effect would be to create a government within a government. This demonstrates the erroneous theory of the court below with respect to the power of the people of a state under the constitution of the United States.

In the City of St. Louis v. Western Union Telegraph Co., 149 U. S., 467, this court, speaking through Mr. Justice Brewer with respect to the government of the city of St. Louis, in the state of Missouri, remarked:

"The city is in a very just sense an '*imperium in imperio.*' Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter."

Notwithstanding the condition so found to exist in the city of St. Louis, there is no intimation from this court that the people of the state of Missouri had exceeded their authority under the constitution of the United States, or that a republican form of government in that state had been destroyed.

In this connection it should be remembered that the people of the individual states have full authority and power to provide for just such offices as they may see proper, to serve for a long term or a short term, according to their own judgment or caprice, to serve for life or for stated intervals, to be appointed, elected or otherwise selected according to the will of the people of the state, and that in all of these matters of detail, the local state government is free and unrestrained by the constitution of the United States.

The power exists in the people to provide any character of government they may wish, provided only it is republican in form. It may adopt one system of laws for one portion of the state, and entirely a different system of laws for another subdivision of the state. The people may elect or otherwise choose the officials for one county at one time, and for a particular term, and may select the officials for other

subdivisions of the state at an entirely different time, and for a wholly different term. As was said by this court in Bowen v. Lewis, 101 U. S., 22:

"There is nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so."

If this be true, and no lawyer will question the soundness of the doctrine announced, wherein can it be said that a republican form of government is in any wise endangered when the people of the state of Colorado say to the people of one of the legal subdivisions of the state, as the city and county of Denver:

"We, through our constitution and the laws enacted by our general assembly, have provided that throughout the entire territory of the state certain governmental duties shall appertain and be performed, and in all other subdivisions of the state we have provided for the election of officers to perform these duties; but we have decided to and do hereby delegate to you the power to select in such manner as you may adopt, for such compensation as you may fix, and for such term as may meet with your approval, your own officers. The mandate in the constitution which we have adopted, requiring officers in each county to be elected at a certain time, shall no longer apply to you. The statutes fixing the compensation of county officers, and the term of those county officers, and the qualifications thereof, shall not apply

to you. All of these matters are to be determined by the people within your own territory. You may have just such officers as you choose, designating them by whatever name that suits the taste of your people. You may pay them a small or liberal compensation, according to your own whims or ability. We demand of you but one thing, and that is, that you shall designate from among the officers for whom you provide, those who shall respectively perform all of those acts and duties required of county officers to be performed under our constitution and general laws. For example, under our constitution and general laws, duties have been prescribed as attaching to the office of county treasurers in the various counties of the state. Those duties are well defined in our laws. We shall not require you to have a treasurer at all in your portion of the state, but we do demand that you shall designate some officer in your territory whose duty it shall be under your designation to perform those acts and duties which the constitution and general laws impose upon county treasurers. We are perfectly willing that these duties shall be performed by an officer of any name, and that the office shall be created by your charter. The matter of designating the agent, and paying this agent, we delegate absolutely to you. The only thing we demand of you in this respect is, that upon some officer, selected in some way, for some period of time, by you, these duties shall be imposed."

This, in brief, is precisely what has been done by the people of Colorado. In section 8 of article XX they expressly declare that the constitutional provisions of the state, in conflict with article XX, shall have no application to the matters and things provided for in said article XX, and in section 2, in the clearest sort of English, the powers of the character above outlined have been conferred, reserving always

the limitation therein expressly stated, that the duties attaching to county officers shall be performed within the territory by some agency selected or elected or otherwise designated by the city and county. This, however, the supreme court of Colorado has decided that the people of that state had no power to do, and the reasons assigned for such ruling is that the delegation of such power to one of the subdivisions of a state would necessarily create an *imperium in imperio*, and that thereby a republican form of government would be abolished.

The decision below is obviously erroneous, deprives the people of the state of Colorado of one of the rights guaranteed to them by the constitution of the United States, and if it is allowed to stand as a correct announcement of the law, it will be rendered possible for a state court, in the most arbitrary manner, to nullify any constitutional provision which the people of the state may see proper to enact, although in such enactment they keep themselves clearly within the limitation fixed by the constitution of the United States.

To the end that such a rule may not be established, and perpetuated as a precedent, we have appealed to this high tribunal with the confident belief that the judgment of the supreme court of Colorado will be reversed.

Respectfully submitted,

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MILTON SMITH,
CHARLES R. BROCK,
Counsel for Plaintiff in Error.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
NOV 16 1906
JAMES H. McKENNEY,
CLERK.

No. 132.

CHARLES S. ELDER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ON THE INFORMATION OF GEORGE STIDGER, THE DISTRICT ATTORNEY OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO, ON THE RELATION OF CHARLES S. BADGLEY.

BRIEF FOR DEFENDANTS IN ERROR.

HENRY J. HERSEY,
Counsel for Defendants in Error.

(19,931)

Smith-Brooks Printing Co. Press, Denver.

Supreme Court of the United States.

October Term, 1906.

No. 132.

CHARLES S. ELDER, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO, on the Information of George Stidger, the District Attorney of the Second Judicial District of the State of Colorado, on the Relation of Charles W. Badgley.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

While the statement of the case in the brief of the plaintiff in error is substantially correct, yet we deem it best to call the attention of the court to some further matters, and to correct counsel's statement as to our contentions below.

It is not in the record, but it is the fact, as stated by counsel in their brief, that Mr. Elder had been a candidate for the office of treasurer of the city and county of Denver at a prior election, held May 17, 1904, pursuant to the city charter of the city and county of Denver, had received a certificate of elec-

tion to said office, qualified and assumed the office on June 1, 1904, the time fixed by the charter; Mr. Badgley was not a candidate at that election.

In the complaint filed in the District Court of the second judicial district of the state of Colorado, it is alleged, among other things, that Charles S. Elder, the plaintiff in error here, was a candidate for the office of treasurer of the city and county of Denver at the general election for state, county and precinct officers under and by virtue of the Constitution and statutes of Colorado, held on November 8, 1904, and that the relator below, Charles W. Badgley, was a candidate for the same office at the same election. (Printed Transcript of Record, page 2.)

The complaint alleges that Badgley received the highest number of votes cast at said election, the canvass of the votes, the issuance of a certificate of election to Badgley, his qualifying and demand on Elder for the possession of the office, etc., and Elder's refusal. (Printed Transcript of Record, pages 2-5.) To this complaint Elder filed a general demurrer, which was sustained by the District Court, whereupon we elected to abide by our complaint, and the cause was dismissed and judgment for costs given to Elder. (Printed Transcript of Record, pages 6 and 7.)

Badgley claimed title to the office of treasurer, as shown by the complaint, by reason of the election thereto on November 8, 1904, the time fixed by the Constitution of Colorado (section 6 of article XIV hereinafter set out in full), while Elder claimed title by reason of the election of May 17, 1904, the time fixed by the local charter of Denver, which charter was not enacted by the general assembly, but adopted

on March 29, 1904, by popular vote of the electors of Denver after having been framed by a charter convention assuming to act under an amendment to the Constitution known as article XX. Inasmuch as Elder attempted to justify by general demurrer, instead of by answer, as he should have done, the charter was not pleaded by him as a defense or justification to the quo warranto proceedings. However, without any ruling upon the question of whether the court could or would take judicial notice of the charter, the provisions of the charter, relied upon by Elder, were referred to in argument in both courts below and considered by the courts.

Upon the dismissal of our complaint in the District Court and the entry of judgment for costs against us we appealed to the Supreme Court of Colorado, and such proceedings were had there that the judgment of the District Court was reversed and final judgment entered in our favor in the Supreme Court.

The judgment in the Supreme Court of Colorado was not only one of ouster in which the people were interested, but also one adjudging the relator, Charles W. Badgley, to be the lawfully elected and duly qualified county treasurer of the city and county of Denver, and entitled to hold and exercise the said office and to perform the duties thereof, and receive the emoluments thereof for the term of two years commencing on the 10th day of January, A. D. 1905, and requiring the defendant to forthwith yield and deliver the office to the said Badgley, and all the books, records, etc., belonging thereto, and for costs.

Counsel for plaintiff in error, at pages 13 to 15 of their brief, in attempting to give the contentions

of the defendants in error in the District and Supreme Courts, neither accurately nor fully state them.

We have never contended that section 2 of article XX of the Constitution of the state of Colorado was, or is, invalid, because of any conflict with the enabling act of congress, or any section or article of the Constitution of the United States, nor, as we understand it, did the Supreme Court of Colorado so decide, but, on the contrary, based its decision on other grounds. Our principal contentions were, and are, that the provisions of the charter of the city and county of Denver, upon which plaintiff in error relies to support his claim to the office of county treasurer, are in conflict with the Constitution of Colorado, and so unconstitutional and void. We did, however, by way of argument, say that, if the construction claimed by Mr. Elder were given, it would result in a conflict with the enabling act and the Federal Constitution.

This case was one of eight cases of like character pending in the Supreme Court of Colorado, and all finally decided at the same time, involving the title to the following county offices in the city and county of Denver, to wit: County judge, county assessor, county clerk and *ex officio* recorder, treasurer, sheriff, county commissioners, justices of the peace and constables. (Printed transcript of Record, page 22.)

The county judge case was an original proceeding in quo warranto in the Supreme Court, while the other seven were proceedings of the same character (though brought under chapter 27 of the Civil Code of Procedure), but pending in the Supreme Court on appeal or error from the District Court.

The opinion in the county judge case gives the reasons of the court for the several judgments rendered in the several cases, and is attached to the record here and printed in the transcript of record at pages 21 to 32. In that opinion our contentions below are correctly and succintly stated by the court as follows:

> "It is the contention of the relator that the charter convention of the city and county of Denver, provided for by article XX, can not legislate in any particular as to the county court, or the county judge, or any other office, officer or matter, not of purely local or municipal concern; that the Constitution provides for one county judge in each county of the state, and requires that all laws relating to courts shall be general and of uniform operation throughout the state, and that the organization, jurisdiction, powers, proceedings and practice of all the courts of the same class or grade, so far as regulated by law, shall be uniform (Const., Art. VI., sections 22, 28); that the charter provisions assuming to increase the number of county judges of the city and county of Denver, to change the time of election of the county judge and time of the beginning and ending of his term, and to legislate in any particular as to the county judge of the county court are unconstitutional and void; that there is nothing in article XX of the Constitution which shows an intention to change the scheme of government in this particular, and

> if there were, it would be unconstitutional; and that there is nothing in article XX which shows any intention to grant any power to the charter convention to supersede the provisions of the Constitution or general statutes relating to the county or the state government, and, therefore, if the charter convention has legislated or attempted to legislate upon any matter which supersedes the provisions of the Constitution or general statutes, such legislation is unconstitutional and void." (Printed Transcript of Record, page 23.)

It will be seen from this quotation that the real questions involved, and our main contentions below, were materially different from those stated in counsel's brief, and that they related to the proper construction of the Colorado Constitution and to the powers vested in the city and county of Denver, and did not raise federal questions.

ARGUMENT.

In my presentation of the argument here I shall divide it into two main subdivisions as follows:

I. That this court has no jurisdiction to review the judgment of the Supreme Court of Colorado, because no federal questions were involved in the cause below, or, at least, not necessarily involved, as there was other matter adjudged by the court below broad enough to sustain the judgment, and because, if it

should be considered that the decision was upon a federal question, the judgment was in favor of the federal authority claimed and not against it, and so the national government has been fully protected in the exercise of its rightful powers, and so the writ of error should be dismissed and the judgment affirmed.

II. That, if this court should determine that it has jurisdiction to review the judgment of the court below, the judgment was right and should be affirmed, because, under the Colorado Constitution the charter of the city and county of Denver can not legislate upon any matters affecting the policy of the state at large or intrenching upon county or state government, but only upon such subjects as are distinctly local and municipal in character, as it is the exclusive function of the general assembly to legislate upon all matters affecting the policies of the state and state or county government. There are, however, other less important reasons given and discussed under this subdivision later in this brief.

I.

AS TO THE QUESTION OF JURISDICTION.

It is apparent from the statement of the Supreme Court of Colorado of our contentions below (Printed Transcript of Record, page 23) which has been quoted above in our statement of the case, and from the opinion of the court below, that the questions involved were non-federal and related solely to the proper construction of the Colorado Constitution, not only of article XX, but also of article XIV and other articles.

Immediately following that statement by the court of the questions involved below, the court says:

> "In our opinion the contention of relator is fully sustained by the majority opinion of the court in People v. Sours, 31 Colo., 369, and in the opinion of the present chief justice specially concurring." (Printed Transcript of Record, page 23.)

This is followed in the opinion by quotations from the opinion in People v. Sours, 31 Colo., 369, and also from another opinion by the same court on the same subject in Parsons v. People, 32 Colo., 221, showing the same holding as in People v. Sours, and the Supreme Court says:

> "We might, without further discussion, conclude this opinion at this point, basing our conclusions upon the ground that the question here presented, under the authorities above cited, is not an open one, but is, and must be held to be, *stare decisis.*" (Printed Transcript of Record, page 26.)

So it is apparent that the essential and material part of the decision of the Supreme Court of Colorado stops here, and the judgment was rendered against the plaintiff in error because by the decision in People ex rel. Elder v. Sours, 31 Colo., 369 (in which case plaintiff in error here was relator), all the questions involved had been decided (in accordance with his contentions at that time), and that decision had been followed in later ones by the Supreme Court, and so the question presented in this case below was

no longer an open one, "but is and must be held to be *stare decisis.*"

However, in deference to the ability and learning of opposing counsel, our Supreme Court, as it expressly stated, then went on to give counsel's position and argument, and to "point out what the court deemed to be the fallacy of both position and argument," and the rest of the opinion is given up to that exposition.

It is upon that portion of the opinion that counsel seek to predicate error, and of which they complain here. In other words, they do not claim error in the real judgment, or in the material parts of the decision, but only in the *obiter dicta* contained in the opinion.

This, we think, does not confer jurisdiction upon this court, as it was not decisive of the issues, and there was other matter adjudged by the court below broad enough to sustain the judgment.

As was recently held by this court:

> "In every case which comes to this court on writ of error or appeal, the question of jurisdiction must first be answered, whether propounded by counsel or not."
>
> Giles v. Teasley, 193 U. S., 146, 160.

This is recognized by counsel for plaintiff in error, for, without waiting for a motion to dismiss to be filed, they begin their brief with a discussion of the question of jurisdiction.

It is also recognized by counsel for plaintiff in error that, on error from a judgment of a Supreme

Court of a state, they must make the strongest showing possible that a Federal question is involved, for in such cases the term "Federal question" has its narrowest meaning. But they are utterly unable to point out where any Federal question was necessarily involved in the case below. The only part of the opinion that they refer to is the argumentative portion which exposes 'the fallacy of both their position and argument.' This is of no more effect in conferring jurisdiction on this court than arguments of counsel, which this court has always held could not be resorted to for the purpose of showing that a question of Federal cognizance was decided by the state court.

Gibson v. Chouteau, 8 Wall., 314.

Sayward v. Denny, 158 U. S., 180.

The opinion of the Supreme Court of Colorado shows conclusively that the questions decided below were those relating to the conflict between the provisions of the charter of the city and county of Denver, a municipal corporation, and the state Constitution. Such questions and the decisions thereon are not reviewable by this court.

Kipley v. Illinois, 170 U: S., 182.

Missouri v. Dockery, 191 U. S., 165.

There are many Federal questions even upon which the state courts can pass and over which the Federal courts have no right of review, such, for example, as the mere construction, either of Federal or state laws.

Cook Co. v. Dock Co., 138 U. S., 635.

Osborne v. Florida, 164 U. S., 650.

Kennard v. Nebraska, 186 U. S., 304.

It will be seen by reading the opinion complained of (Printed Transcript of Record, pages 21 and 32) that even were a Federal question involved and decided by the state court yet the decision against the plaintiff in error was also based upon independent grounds, not involving a Federal question, which were broad enough to sustain the judgment. Under such circumstances this court has uniformly dismissed the writ of error without considering the Federal question, because it has no jurisdiction.

> Kennebec and Portland R. R. Co. v. Portland and Kennebec R. R. Co., 14 Wall., 23.
>
> Eustis v. Bolles, 150 U. S., 361.
>
> Giles v. Teasley, 193 U. S., 146.

The question involved below, upon which the case was decided and which was broad enough to sustain the judgment independent of any Federal question, was whether, under the Colorado Constitution, the charter of Denver could legislate as to the county treasurer and other county officers, conceded by plaintiff in error, as the opinion says, to be "*state officers*, in that they derive their existence and powers from the Constitution and general laws and perform state and governmental functions." (Printed Transcript of Record, page 26.) In other words, the question was, Did the Colorado Constitution delegate to the municipality of Denver the complete sovereign powers of the state for that locality, or did it merely grant to Denver freedom to legislate as to those matters purely of local and municipal concern?

The Supreme Court answered the former in the negative and the latter in the affirmative, and so gave

judgment against the plaintiff in error and thereby merely interpreted its own Constitution.

Even if we should accept the proposition of counsel for plaintiff in error that the opinion of the state court, holding that the charter provisions relied on were unconstitutional was in effect a decision that they were repugnant to the Constitution and laws of the United States, yet that would not give this court jurisdiction to review, because not only is the charter in this instance not a state statute, but, if it were, the decision was *against* its validity. It is only when the decision is in favor of the validity of a state statute which is claimed to deprive a party of his rights under the federal Constitution and laws that this court has jurisdiction.

Commonwealth Bank v. Griffith, 14 Pet., 56.

Phoenix Ins. Co. v. Gardiner, 11 Wall., 204.

Missouri v. Andriano, 138 U. S., 496.

Whitten v. Tomlinson, 160 U. S., 231.

Nor is a Federal question sufficiently shown by the fact that a state court, while declaring a statute to be in violation of the Federal Constitution, yet by its judgment gave effect to it when the decision of the Federal question was not an essential element in determining the right adjudicated.

Rutland R. R. Co. v. Central Vermont R. R. Co., 159 U. S., 630.

It is well settled that in order to raise a Federal question general references to the Federal Constitution or even to specific articles of the Constitution

are not sufficient. It is only by the most general references that plaintiff in error attempts to point out the alleged violation of the Federal Constitution.

Chapin v. Fye, 179 U. S., 127.
Clarke v. McDade, 165 U. S., 168.

Moreover, we shall search the record in vain in an endeavor to find anything showing that any Federal question was raised and decided below. The fact that plaintiff in error in his assignment of errors has sought to raise Federal questions can not help him. An assignment of errors can not be availed of to import questions into a cause which the record does not show were raised and properly raised in the court below and rulings asked thereon, so as to give this court jurisdiction.

Cornell v. Green, 163 U. S., 75.
Fowler v. Lamson, 164 U. S., 252.

We should at least expect to find an exception saved by plaintiff in error to the judgment below specially raising the alleged Federal question, but we do not. He does not even embody in the record his petition to the Supreme Court of Colorado for a rehearing, though he does insert (Printed Transcript of Record, pages 18-19), the final judgment which contains a recital that the cause came on to be heard upon his petition for a rehearing, and that the judgment theretofore entered was modified to the extent, as it appears from a comparison of the judgments, of causing final judgment to be entered in the Supreme Court instead of simply reversing the judgment of District Court and remanding the cause

with instructions to the District Court to overrule his demurrer. (Printed Transcript of Record, pages 18-19.)

Neither is the charter of the city and county of Denver found anywhere in the record. It is not a general statute of the state of Colorado, but merely a local, municipal charter, adopted by popular vote after being framed by a local charter convention. How can this court judicially know what the provisions of that charter, which the Supreme Court of Colorado passed upon, are? and how, therefore, can this court know whether the Supreme Court of Colorado correctly decided the question below or not?

It would seem that this case is either one of those in which, "under the settled rule in this court," the writ of error must be dismissed because "the Federal question asserted is manifestly lacking all color of merit" (Wabash R. Co. v. Flannigan, 192 U. S., 29, 38), or one in which the Federal question asserted was not, in the sense which would give this court jurisdiction, raised or involved below.

City of New Orleans v. New Orleans W. Co., 142 U. S., 79.

As has been said by this court in another case:

> "The controversy relates exclusively to the title to a state office, created by a statute of the state, and to the rights of one who was elected to the office so created. Those rights are to be measured by the statute and the Constitution of the state, excepting in so far as they may be protected by any provision of the Federal Constitution.

"Authorities are not required to support the general proposition that in the consideration of the Constitution or laws of a state this court follows the construction given to those instruments by the highest court of the state. The exceptions to this rule do not embrace the case now before us."

Wilson v. State of North Carolina ex rel. Caldwell, 169 U. S., 586, 592.

We respectfully submit that the writ of error ought to be dismissed and the judgment affirmed.

II.

AS TO THE MERITS OF THE CONTROVERSY.

The second subdivision of our brief is only necessary to be considered in the event that this court shall be of the opinion that it has jurisdiction and ought to examine into and determine the merits of the controversy.

I am firmly convinced that no federal question is involved herein in such sense as to give this court jursdiction of this cause. While the Colorado Supreme Court, in its opinion, referred to certain provisions of the federal Constitution, yet these were not decisive of the issues, and the judgment of the court was based not upon the question whether the federal Constitution was violated, but upon the question whether the provisions of the charter of the city

and county of Denver, relied upon by the plaintiff in error, were in conflict with the Colorado Constitution.

After able and exhaustive briefs and argument, not only by the learned counsel for the plaintiff in error here, but by numerous other able counsel representing other parties in some seven other cases, involving exactly the same questions, the Supreme Court of Colorado held that the charter provisions involved were unconstitutional, because in conflict with the Colorado Constitution, and that article XX of the Colorado Constitution did not confer upon this, or any charter convention, the power to legislate upon any subject, except such as was purely of local and municipal concern, and that under the Constitution of Colorado the county treasurers of all the counties of the state, including the city and county of Denver, as well as the other county officers designated in section 8 of article XIV, must be elected at the election in November, 1904, and biennially thereafter, and that the election of the plaintiff in error as treasurer at the election held in Denver on May 17, 1904, under the local charter, was illegal and void so far as it concerned the office of county treasurer. Upon the question whether or not the plaintiff in error is the city treasurer (as distinguished from county treasurer) the Supreme Court made no judgment, and we are therefore not now concerned with that.

The judgment of the Supreme Court of Colorado was therefore based on the construction of the Colorado Constitution, and under the decisions of this court that construction is binding even upon this, our highest and most distinguished court. However, as counsel for plaintiff in error in subdivision VI, from page 43 to page 76 of their brief, have discussed the

proposition as to whether or not the Supreme Court of Colorado correctly construed the Colorado Constitution, using nearly one-half of the space of their brief on that subject, I feel that it is incumbent upon me to reply to their argument on this phase of the case below.

UNDER THE COLORADO CONSTITUTION THE CHARTER OF THE CITY AND COUNTY OF DENVER CAN LEGISLATE ONLY AS TO THOSE MATTERS WHICH ARE DISTINCTLY LOCAL AND MUNICIPAL IN CHARACTER, AND CAN NOT THEREFORE LEGISLATE UPON ANY MATTERS AFFECTING THE POLICY OF THE STATE AT LARGE OR INTRENCH UPON COUNTY OR STATE GOVERNMENT, AS IT IS THE EXCLUSIVE FUNCTION OF THE GENERAL ASSEMBLY TO LEGISLATE UPON THE LATTER SUBJECTS.

Our contention, simply and concisely stated, is that neither article XX, nor any other portion of the Constitution of Colorado, anywhere expressly, or even by necessary implication, authorizes the charter of the city and county of Denver to legislate as to county officers, the time of their election, the term of their offices, their duties, etc.; that under the Colorado Constitution there is still to be elected and to serve in the city and county of Denver a county treasurer (as well as all other county officers so called), at the times and for the terms fixed by the Constitution for all counties in the state. In short, that under the

Colorado Constitution the charter of the city and county of Denver can only constitutionally legislate upon those matters which are distinctly local and municipal in character, and can not intrench upon county or state government.

This case is one of ten cases which were brought in January, 1905, in the District Court of the city and county of Denver, of like character, affecting the title to the other county offices, namely: Sheriff, treasurer, assessor, coroner, clerk, recorder, county superintendent of schools, justices of the peace and county commissioners; eight of them were taken to the Supreme Court, and six of them were finally decided at the same time the case at bar was. The amendment of section 8 of article XIV of the Constitution, as adopted at the November election, 1902, at the same time the amendment to the Colorado Constitution known as article XX was adopted, provides as follows:

> "*There shall be elected in each county* at the same time at which members of the general assembly are elected, *commencing in the year nineteen hundred and four,* one county clerk, who shall be ex officio recorder of deeds and clerk of the board of county commissioners; one sheriff; one coroner; *one treasurer,* who shall be collector of taxes; one county superintendent of schools; one county surveyor; one county assessor, and one county attorney, who may be elected, or appointed, as shall be provided by law; and such officers shall be paid such salary or compensation, either from the fees,

perquisites and emoluments of their respective offices, or from the general county fund, as may be provided by law. The term of office of all such officials that expire in January, 1904, is hereby extended to the second Tuesday in January, A. D. 1905. This section shall govern, except as hereafter otherwise expressly directed or permitted by constitutional enactment."

Colorado Constitution, section 8, article XIV.

3 Mills' Annotated Statutes of Colorado (Revised Supplement), section 483, page 37.

The contention of the defendants in error is, that this section is applicable to the city and county of Denver the same as it is to every other county in the state, and that it required the election of each one of the officers enumerated in the foregoing section at the general election on November 8, 1904, and that the term of office of the officers so elected began on January 10, A. D. 1905, and continues for two years thereafter, and that there is nothing in article XX of the Colorado Constitution that expressly provides for a different scheme of county government in the city and county of Denver from that provided for each and every other county in the state by this section and other sections of the Colorado Constitution not necessary to enumerate now; that the provisions of the charter framed by a charter convention of the city and county of Denver (elected in pursuance of article XX of the Colorado Constitution) and adopted by popular vote under the same ar-

ticle, providing for the election of a county treasurer and other county officers on May 17, 1904, and fixing the term of office for four years beginning on the 1st day of June, A. D. 1904, are therefore unconstitutional and void, and the claim of the plaintiff in error to the title to the office of county treasurer, by virtue of the May election in 1904, held in accordance with such charter provisions, but, as we contend, in violation of the Constitution and General Statutes of Colorado, is not well founded, and can not be sustained.

In short, it is the contention of the people and of the relator Badgley, the defendants in error here, that the charter of the city and county of Denver can not legislate in any particular as to the time of election, term of office, or jurisdiction, or duties of those officers commonly known as county officers, and particularly of county treasurer, or on any other matter not of purely local or municipal concern; that the Colorado Constitution provided for the election of a county treasurer in each county of the state on November 8, 1904, and every two years thereafter, and fixed the term of office for such county treasurer at two years from January 10, A. D. 1905; that the charter provisions assuming to provide a different and longer term and another and different time of election for the county treasurer in the city and county of Denver than that provided for in other counties of the state are unconstitutional and void.

In this discussion, certain fundamental principles must be borne in mind:

First. That under our system of government, the Constitution of a state is not a grant of power to the general assembly, but, on the contrary, is

merely a limitation upon its power, and that the general assembly has plenary power to pass any and all laws not expressly prohibited by the Constitution, or necessarily implied as prohibited by reason of anything therein contained.

Second. That this construction does not apply to municipal corporations or to the legislative bodies of municipal corporations.

Third. That it therefore follows that unless the Colorado Constitution expressly authorizes the charter-making power of the city and county of Denver to legislate in a given matter, then the power to so legislate does not exist. In short, whatever authority the charter convention possessed was derived entirely from an *express* grant contained in article XX of the Colorado Constitution.

In this connection it is well to remember that *the charter convention was called into existence solely and wholly by virtue of article XX,* which determined and limited its functions, powers and duties, *and that it possessed no such plenary power as is vested in the general assembly.*

Section 4 of article XX of our Colorado Constitution provides that:

> "The charter and ordinances of the city of Denver, as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver; but the people of the city and county of Denver are hereby vested with and they shall always have exclusive power

in making, altering, revising or amending their charter."

Colorado Constitution, section 4, article XX.

3 Mills' Annotated Statutes of Colorado (Rev. Suppl.), section 528-d, page 46.

It is not provided that the people of Denver may make, alter, revise or amend the statutes or general laws of the state, but only "their charter."

It then goes on to provide for the election of delegates to a charter convention, "who shall constitute a charter convention to frame *a charter* for said city and county in harmony with this amendment." It further provides that if such charter shall be approved by a majority of those voting thereon, it shall be certified to the secretary of state, "whereupon *it shall become the* CHARTER *of the said city and county of Denver and shall become the organic law thereof, and* SUPERSEDE ANY EXISTING CHARTERS *and amendments thereof.*"

Colorado Constitution, section 4, article, XX.

3 Mills' Annotated Statutes of Colorado (Rev. Suppl.), section 528-d, page 47.

The word "charter," as used here, must be construed in its ordinary meaning, as words in the Constitution must be understood to have been used in their natural sense.

Carpenter v. People, 8 Colo., 116, 125.

Alexander v. People, 7 Colo., 155, 165.

People v. May, 9 Colo., 80, 85.

As we shall show later the word "charter" as here used is not synonymous with "law."

McMurray et al v. Wright, Mayor, et al.,
19 Colo. App., 17, 26, 27.

Denver has always (prior to March 29, 1904, when the present charter was adopted by local vote under said article XX) existed under a special charter enacted by the general assembly, and the charter framed by the last charter convention and approved by vote of the majority of the electors is but the successor of the previous charter (Parsons vs. People, 32 Colo., 221, [illegible] and can properly legislate only upon those [illegible] which are distinctly municipal and ordina[illegible]roper for municipal legislation, as distinguished from those matters which relate to county or state government and which concern the people or policy of the state at large.

It should be particularly noticed that there is nothing in article XX, relating to what the new charter shall provide, which shows any intention to grant any power to the charter convention to supersede the provisions of the Constitution or general statutes relating to the county or state government. Indeed, the only language in article XX, showing that the new charter should supersede anything, is that which states that it shall "supersede any existing *charters* and amendments thereof."

If it was the intention for this article of the Colorado Constitution to authorize the charter convention to make any provision which should supersede any existing general statutes, it would at this point have been expressly stated that such charter should super-

sede not only the existing charters and the amendments thereto, but that it should also supersede the general statutes.

This statement is in entire harmony with the previous decisions of the Colorado Supreme Court interpreting article XX.

For the full text of article XX of the Colorado Constitution, see

> 3 Mills' Annotated Statutes of Colorado (Revised Supplement), sections 528-a to 528-h, pages 43-51.
>
> Colorado Session Laws of 1901, chapter 46, pages 97-106.

Mr. Justice Steele of the Colorado Supreme Court, in sustaining article XX, and giving the majority opinion of the court, in answer to certain objections raised by counsel for respondent against the constitutionality of article XX, clearly and unequivocally sustains the principle herein contended for. He says:

> "Counsel say: 'Had it been the intention that the Constitution and laws should be in force in this territory, this instrument would have so stated. The language of the above provisions is plain and unambiguous. It has been said that in construing a constitutional provision it will be presumed that every word was weighed and its meaning carefully considered before its insertion in the instrument; and this instrument says that the city and county of Denver can adopt any measure, and shall always have the exclusive power to make, alter and revise their

charter. That means everything. If not, why not? This charter is to be the organic law. A legislative act is now the charter of the city of Denver, and the Constitution of this state and the laws thereof constitute the organic law of this county. But this instrument changes all this, and says that the charter as framed by the charter convention shall not only be the charter of the city and county, but shall be the organic law thereof. That language means something. It displaces, and was intended to displace, the Constitution, the laws, and the general assembly.'

"If this amendment must be given that construction, it can not be sustained. Even by constitutional amendment, the people can not set apart any portion of the state in such manner that that portion of the state shall be freed from the Constitution, or delegate the making of constitutional amendments concerning it to a charter convention, or give to such charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from municipal, or city government. The duties of judges of the District Court, county judges, district attorneys, justices of the peace, and, generally of county officers, are mainly governmental; and, so far as they are governmental, they may not be controlled by other than state agencies without undermining the very foundation of our government. *Under the*

Constitution of the United States, the state government must be preserved throughout the entire state; and it can be preserved only by having within every political subdivision of the state, such officers as may be necessary to perform the duties assumed by the state government under the general laws as they now exist, or as they may hereafter exist.

"*This distinction* between the governmental duties of public officers and their municipal duties *is fundamental, and therefore is not avoided or affected by the consolidation.*

" 'Counties, townships, school districts and road districts do not usually possess corporate powers under special charters; but they exist under general laws of the state which apportion the territory of the state into political divisions for convenience of government, and require of the people residing within those divisions the performance of certain public duties as a part of the machinery of the state; and in order that they may be able to perform those duties, vest them with certain corporate powers. Whether they shall assume those duties or exercise those powers, the people of the political divisions are not allowed the privilege of choice; *the legislature assumes this division of the state to be essential in republican government,* and the duties are imposed as a part of the proper and necessary burden which the citizens must bear in maintaining and perpetuating constitutional lib-

erty.'—Cooley's Constitutional Limitations, 240.*

"'*A municipal corporation proper is created mainly for* the interest, advantage and convenience of the *locality* and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for the purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. *With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy.*'—1 Dillon's Municipal Corporations, section 23.

"The respondent's construction, however, is not that placed upon the amendment by counsel for the petitioners, or, we assume, by the people. The provision that 'Every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the Constitution or by the general law, as far as applicable,' *completely contradicts the assumption that the amendment regards such duties as being subject to local regulation and control. The amendment is to be considered as a whole, in view of its expressed purpose of securing to the people of Denver*

absolute freedom from legislative interference in matters of local concern; and, so considered and interpreted, we find nothing in it subversive of the state government, or repugnant to the Constitution of the United States."

People ex rel. Elder, as Treasurer of the City and County of Denver v. Sours, 31 Colo., 369, 385-387.

Mr. Justice Gabbert, of the same court, in a specially concurring opinion, shows also that the court viewed the amendment as relating solely to matters of municipal government as distinguished from county or state government, for he says:

" * * * *the whole scope and purpose* of the amendment *was to provide home rule for certain cities with respect to certain governmental matters local in their nature.* This is apparent from the contents of the amendment itself, as well as the provisions designating what should appear upon the official ballot in order to enable the electors to vote for or against its adoption. *Its several provisions all relate to this one general object, and are designed to accomplish this one purpose,* in so far as they *relate to cities designated in the amendment either by name or class."*

People ex rel. Elder, Etc., v. Sours, 31 Colo., 369, 410.

Later, the Colorado Supreme Court, when the question as to what the charter convention could constitutionally legislate upon was directly involved, affirmed the doctrine laid down in People ex rel. Elder, Etc., v. Sours, *supra*, and distinctly announced that the scheme of government contemplated was restricted to that of the municipality proper, and did not purport to nullify the Constitution or general laws of Colorado as to county or state government.

Mr. Justice Campbell, of the Colorado Supreme Court, in giving the unanimous opinion of the court in that case, says:

> "Neither is this revenue act of 1902 in violation of any provision of article XX. In the majority opinion of this court, in People ex rel. Sours, 31 Colo., 369; *it was clearly indicated that the general scheme of government therein contemplated is restricted to that of the municipality proper, and does not intrench upon county or state government.* It does not purport to nullify the Constitution or general laws of the state in so far as they pertain to county or state government, or attempt to interfere with the power of the state in raising state revenue."
>
> Parsons v. People, 32 Colo., 221, 240.

Again, the Colorado Supreme Court, in a still later case, holds in interpreting certain provisions of article XX of the Colorado Constitution and certain statutes passed in aid thereof, that: "*The city and county of Denver is still a county as well as a city,*"

and cites in support of this, the case of People v. Sours, *supra*.

> City Council of the City and County of Denver v. Board of Commissioners of Adams Co., 33 Colo., 1, 13.

This last case was one where Adams county sought to mandamus the city council of Denver to compel the latter to levy a tax to pay a certain claim arising by reason of the dismemberment of the old Arapahoe county, which had theretofore included within its county limits the city of Denver, and "the formation of three *new counties* out of its territory."

> Ibid., page 4.

All through the opinion in that case it is apparent that Denver is still a county. In addition, note the following quotations therefrom:

> "When these three measures went into effect, that which was formerly the county of Arapahoe, therefore, because three separate political subdivisions of the state, bearing the names just mentioned."

> Ibid., page 4.

> "We do not concede that this argument is valid, even if the city and county of Den-

ver *became a county* before Adams county was created."

Ibid., pages 11-12.

See, also,

McMurray et al. v. Wright, Mayor, et al., 19 Colo. App., 17, 26.

Aichele et al. v. Chamberlain, 19 Colo., App., 17, 26.

One of the objections made to the constitutionality of article XX in the case of People ex rel. Elder, etc., v. Sours, *supra,* was that it violated section 4 of the enabling act (18 U. S. Stat. at L, 474), providing that the Constitution should be republican in form and should not be repugnant to the Constitution of the United States and that by reason of the amendment authorizing the charter convention to frame not only a charter of the city and county of Denver, which should not only be the charter, but the organic law thereof, that that displaced, and was intended to displace, the Constitution and the laws and the general assembly.

People ex rel. Elder, etc., v. Sours, 31 Colo., 383, 385.

But the Colorado Supreme Court held, as before stated, that if the amendment meant that, it could not be sustained.

And in Fire and Police Board case the same court held that the purpose of article XX was: "To give to the people of the new corporation as large a measure of *home rule in municipal affairs* as could be

granted under a republican form of government, which the state is obliged to maintain under its compact with the federal government, as evidenced by the enabling act."

People ex rel. Attorney General, v. Adams, 31 Colo., 476, 480.

The Colorado Court of Appeals had occasion, soon after the adoption of article XX of the Colorado Constitution, to pass upon the question as to whether the city council of Denver under the new scheme of government should canvass the vote as provided in the old charter, which was then in force until the new one should be adopted, or whether the general statutes of Colorado relating to the canvass of the vote for county elections were in force, and the court held that the provisions of the general statutes and not the charter, were in force, and said:

> "The duties of city officers are prescribed by the charter, and the duties of county officers by the general laws of the state. That the city government and the county government are in the hands of the same persons is immaterial. The distinction between the functions pertaining to a city government and those pertaining to a county government, is not, and does not purport to be, affected by the amendment. While the city and county of Denver is a city, it is also a county, and any election lawfully

held by its inhabitants is a county as well as a city election."

McMurray et al. v. Wright, Mayor, et al., 19 Colo. App., 17, 24.

Aichele et al. v. Chamberlain, 19 Colo. App., 17, 24.

That opinion then goes on to quote a portion of the opinion of the Supreme Court of Colorado in the case of People ex rel Elder, etc., v. Sours, hereinbefore quoted, as showing "the character of the corporation which was created by the amendment," and adds:

"Article XIV of the Constitution provides for counties and county officers. By section 2 of the amendment, *the new corporation is made subject to the general provisions of that article, and of the state legislation enacted in pursuance of it; so that*, although a city, *it is a county* equally with any other legal subdivision of the state to which the Constitution and statutes have given the name of county * * * in so far as the functions of a city are to be exercised by the consolidated city and county, the charter and ordinances of the city are applicable to it; *but they can not be applicable to it when exercising the functions of a county.*"

McMurray et al. v. Wright, Mayor, et al., 19 Colo. App., 17, 26.

It is most important to note that that opinion also draws the distinction between the word "*char-*

ter" as used in article XX and the word "*law*," holding the former to relate to municipal matters and the latter "to the public law of the state or sovereignty."

Ibid, pages 26-27.

See, also,

Airy v. People, 21 Colo., 144, 153.

This sustains my contention that the word "charter" as used in article XX must be construed in its ordinary meaning.

The purport of all these decisions, therefore, both of the Supreme Court and the Court of Appeals of Colorado, is uniformly to the effect that the charter convention was authorized under the Colorado Constitution to act *only* as to those matters *which were purely of local and municipal concern.*

I am aware that section 2 of article XX provides that "the officers of the city and county of Denver shall be such as by appointment or election may be provided for by charter." But this provision simply means that the people of Denver had the right to designate their own municipal or city officers and select them in their own way without state interference, and could have few or many such purely city officers, according to their wishes. So, too, they were thereby expressly given power to fix the term, jurisdiction, duties and qualifications of such purely city officers. While by a subsequent clause of the same section it was permitted to the charter convention to designate any charter officers who should perform the acts and duties required of county officers to be done by the Constitution or by the general law, this was in the nature of a reservation to the effect that the general

statutes and the Constitution of Colorado were still in force in Denver to the same extent as before the adoption of article XX. It was not a grant of power to a charter convention.

> People ex rel. Elder, etc., v. Sours, 31 Colo., 369, 387.
>
> McMurray et al. v. Wright, Mayor, et al., 19 Colo. App., 17.

In other words, the charter convention can legislate absolutely and exclusively only as to matters relating to local or municipal affairs proper and which are not in conflict with the general statutes or Constitution.

But as the Court of Appeals of Colorado said:

> "The charter * * * can not be applicable to it when exercising the functions of a county."
>
> McMurray et al. v. Wright, Mayor, et al., 19 Colo. App., 17, 26.

And while the court said that of the old charter while it was in force in the interim between the taking effect of article XX and the adoption of the present charter, yet the reasoning therefor makes it equally pertinent to the existing charter.

Judge Cooley in his work on Constitutional Limitations, says:

> "And the general disposition of the courts in this country has been to *confine*

municipalities within the limits that a strict construction of the grants of the powers in their charters will assign to them."

Cooley Const. Lim. (7th Ed.), 271.

See, also, page 565.

Again, he says:

"The powers conferred upon municipalities must be construed with reference to the object of their creation, namely, as agencies of the state in local government. *The state can create them for no other purpose, and it can confer powers of government to no other end*, without at once coming in conflict with the constitutional maxim, that legislative power can not be delegated, or with other maxims designed to confine all the agencies of government to the exercise of their proper functions."

Cooley Const. Lim. (7th Ed.), 309.

That the charter can legislate only as to those matters which are distinctly municipal, is further borne out by section 6 of article XX of the Colorado Constitution, which provides that cities of the first and second class in Colorado are empowered to adopt by popular vote like charters framed by delegates.

If the charter of the city and county of Denver can constitutionally legislate as to county officers, the time of their election, the terms of their respective offices, and the jurisdiction of the courts, etc., in said city and county of Denver, then all charters of the

cities of the first and second classes, which charters may hereafter be framed, not by the general assembly, but by a local municipal charter convention, may properly legislate upon like subjects. We might, therefore have striking anomalies in Colorado in counties like Pueblo, El Paso Fremont and Boulder, where there are two or more cities of the first and second class, by having a sheriff, treasurer, or other county officers, so called, provided by the charter of one city and other like, but yet different, officers provided by the charter of another city in the same county, or to put it more strongly we might have a County or District Court with a jurisdiction, practice, powers, etc., defined by the charter of one city but different from the jurisdiction, practice, powers, etc., of the same County or District Court sitting within the terminal limits of another city in the same county. And this, too, notwithstanding the positive provision of the Constitution of Colorado that

> "All laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings and practice of all the courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts severally shall be uniform."
>
> Colo. Const., section 28, article VI.
>
> 1 Mills' Annotated Statutes of Colorado, section 400, page 276.

In short, we might have in such counties several sheriffs, treasurers, county clerks, etc., with varying

times of election, with varying terms of office, courts of the same class or grade with varying jurisdiction, powers and practice, all of which could be fixed and determined not under constitutional restraints and limitations, but according to the whims and fancies of the citizens of a municipality as embodied in a charter framed by a local charter convention of such respective cities in such counties and adopted by the local vote of the citizens of the particular municipality. Such an anomalous condition was never intended, but such is the anomaly in government which counsel for plaintiff in error construe into (I can not say out of) article XX of the Colorado Constitution in their effort to support their contention that the decision of the Supreme Court of Colorado was erroneous. In a somewhat similar case in Missouri, in which it was contended that St. Louis was intended under Missouri Constitution to be made different from other portions of that state, the Missouri Court of Appeals held that St. Louis was still a county, and any provision of its charter to the contrary was void, and said that "anomalies in the political system are not to be arrived at by construction."

State v. Finn, 4 Mo. App., 347.

Moreover, in article XX there is no express limitation upon the power of the general assembly to legislate in such manner as it sees fit, in accordance with the other provisions of the Constitution, as to the term, duties or jurisdiction of county officers. It would be doing violence to all rules of construction to hold that, by reason of there being granted by article XX to the citizens of Denver the right to frame a

charter for purely local municipal government, that charter, without, at least, an express provision in the Constitution authorizing it, could properly or constitutionally, legislate as to the matters affecting county and state government, or the policy of the state at large in reference to county and state affairs.

The general plan of the American system of government must always be kept in mind. As is well said by Cooley:

> "The American system is one of complete decentralization, the primary and vital idea of which is that local affairs shall be managed by local authorities, *and the general affairs only by the central authority.* * * * It is this, also, that impels the several states, as if by common arrangement, to subdivide their territories into counties, towns, road and school districts, and to confer powers of local legislation upon the people of each subdivision. * * * *The system is one which almost seems a part of the very nature of the race to which they belong.*"
>
> Cooley Const. Lim. (7th Ed.), 261, 263.

Again he says, referring to municipalities:

> "*They are governments of enumerated powers*, acting by delegated authority. * * * * The local authorities can exercise those (powers) only which are expressly or impliedly conferred, and subject to such

regulations or restrictions as are annexed to the grant."

Cooley Const. Lim. (7th Ed.), 266.

See, also,

Bernheimer v. Leadville, 14 Colo., 518, 520.

It is important to bear in mind the fundamental distinction between municipal corporations and counties. This was brought out very forcibly in the opinion of our Supreme Court in the original case upon the constitutionality of article XX (People ex rel. Elder, etc., v. Sours, 31 Colo., 269, 385-87), by Mr. Justice Steele, and also by Mr. Justice Campbell in the case of Parsons v. People, 32 Colo., 221, and again in the City Council, etc., v. Board of Commrs., etc., 33 Colo., 1, as well as by the Court of Appeals in the case of McMurray v. Wright, 19 Colo. App., 17.

In addition to what is said in the foregoing citations, I desire to call the court's attention to the following upon the same propositions:

"A municipal corporation * * * is invested with the power of *local* self-government. Quasi corporations on the other hand * * * are merely auxiliaries of the state."

Carpenter v. People, 8 Colo., 116, 125. 125.

Counties "are of a purely political character, constituting the machinery and essen-

tial agency by which free governments are upheld and through which for the most part their powers are exercised. Their functions are wholly of a public nature. Counties are subordinate agencies for the orderly government of the state within the scope of their authority; hence they *are subject to the control and direction of the legislature in which chiefly the sovereignty of the state is represented and exercised.*"

11 Cyc., 342, and cases cited.

"A *county is* a governmental agency or political subdivision of the state, *organized for the purpose of exercising some functions of the state government*, whereas, a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government."

11 Cyc., 342, note 11.

San Mateo Co. v. Coburn, 130 Cal., 631, 636.

Comrs. v. Mighels, 7 Oh. St., 110, 118.

"As in the case of private corporations, so also in the case of strictly municipal corporations, such as cities, there must be an acceptance of the charter, either express or implied. In this respect, they differ from public quasi-corporations. Cities are regarded as corporations created for their own benefit, while inhabitants of a district invested by

statute, *in invitum*, with particular powers, are made corporations without their consent. *One feature by which a city is distinguished from a county is in that the powers under a county government are conferred by the legislature, irrespective of the will of the inhabitants of the county;* whereas, the inhabitants of a city must determine whether they will accept the corporate powers offered them to be exercised by the officers of their own selection. In other words, municipal corporations proper are called into existence through the direct solicitation or by the free consent of the people who compose them. *Counties are the legal subdivisions of the state, created by the sovereign power of the state, of its own sovereign will*, without the particular solicitation, consent or concurrent action of the people who inhabit them. An act incorporating a municipality takes effect without acceptance, as an act; and yet, without organization thereunder, it would be a dead letter. The legislature may provide that any particular charter shall not take effect until accepted; and it can prescribe the way in which the acceptance shall be signified, as that it must be by a majority vote of the inhabitants."

1 Smith on The Modern Law of Municipal Corporations, section 76.

The following quotations from a leading case in California, upon the character of the government of

the city and county of San Francisco, sustain the views hereinbefore set forth.

While I think that the decisions of the Colorado Supreme Court heretofore cited and quoted, are amply sufficient to sustain our contentions, I cite these California, Missouri and Washington cases as corroborative of the views expressed by Colorado Supreme Court.

SOME CALIFORNIA CASES.

In Kahn v. Sutro, 114 Cal., 316 (33 L. R. A., 620, 623-7), it was said:

> "Section 1 of the act of April 19, 1856 (Stat., 1856, page 145), commonly known as the 'Consolidation Act,' by virtue of which the present corporate charter of San Francisco exists, declares: 'The corporation or body politic and corporate now existing and known as the city of San Francisco shall remain and continue to be a body politic and corporate in name and in fact by the name of the city and county of San Francisco,' etc. The effect of the legislative action was merely to continue, with extended boundaries and additional powers, the city of San Francisco, which had been incorporated in 1850; and, although the provisions of the charter were in many respects appropriate for a county, the corporation thus created remained a city, under a different name, *but the inhabitants of the territory thus brought under the provisions of the city charter were*

not invested with county government. People v. San Francisco City and County Supers., 21 Cal.,668; Wood v. San Francisco City and County Election Comrs., 58 Cal., 361.

* * * * * *

"In Staude v. San Francisco City and County Election Comrs., 61 Cal., 313, it was held that the provisions of section 4109 of the Political Code, as amended in 1881, by which the time for the election of city and county, as well as other officers throughout the state, was changed, were applicable to San Francisco, by virtue of the clause in section 6 of article XI, that 'cities or towns heretofore organized shall be subject to and controlled by general laws.' *It may therefore be regarded as settled by the decisions of this court that the city and county of San Francisco is a municipal corporation, and, in matters of government, is to be regarded as a city.* But, while the people of San Francisco are thus to be regarded as under a municipal government, with the right to select officers to execute the powers of that government according to the terms of its charter, the territory over which that government is exercised is at the same time a county; and for the purposes for which county officers exercise authority not derived from the charter, and disconnected with municipal government, its officers are properly termed 'county officers.' Considered in its political and judicial relations to

other portions of the state, the officers elected by its voters, to the extent that they exercise only such powers as are given by laws relating merely to counties, and who do not derive any of their authority from the charter, are to be regarded as county officers, as distinguished from city officers."

* * * * * *

"*San Francisco is, therefore, both a city and a county*, and although the boundaries of the two bodies corporate are coincident, the electors within this territory vote for officers whose authority and functions are derived exclusively from the charter of the city, and also for officers whose powers and duties are prescribed by general laws, and upon which the charter is silent. *It must follow from this that some of its officers are city officers, and others are county officers.* There is nothing unusual or inconsistent in this. The 'government' of the city is municipal, and the officers who are to exercise that government are municipal officers; *but the territory in which that government is exercised is still a part of the state, and, for all purposes other than municipal government, it is subject to its control, with the right on the part of the state to authorize the election therein of such officers as may be required to execute its general laws*, or to perform such functions disconnected with the municipal government as may pertain to the government of the state. *It would not be contended, if the city was only a por-*

tion of the county, or if a county should be composed entirely of incorporated cities, that the state would be precluded from authorizing the election by the voters of the county of officers to carry out those provisions of its laws which pertain to the state at large, and which have no connection with municipal affairs, *and this rule is not changed where the county consists of a single city instead of several.* Although the same body of voters choose the different officers, the functions of the officers chosen by them are distinct in their nature, and *the character of the officers must be determined by the source of their authority and the functions they are to exercise.*"

* * * * * *

"The guaranty given to the city and county of San Francisco by the Constitution of the right to continue its government under the charter which it held at the adoption of that instrument until it shall adopt another, including the right given by that charter to change its officers every two years if it shall so elect, can not be taken away by the legislature under the form of imposing upon these officers certain functions exercised by county officers in other counties of the state, and fixing the term of such county officers at four years. But, as the territory thus placed under municipal government still remains a county, and is not taken out of the control of the state for all purposes not embraced within the scope of municipal government,

the authorization by the legislature of an election by the voters of that territory for officers to carry out these laws, does not make the persons so elected city officers. *The Constitution has declared that certain officials shall be elected within each county, and, if San Francisco is a county, the legislature* is authorized to provide for the election of these officers by its voters and *is not precluded therefrom by the fact that they are voted for by the electors of the municipality at the same time with the election of its municipal officers.*"

* * * * * *

"The district attorney, sheriff, county clerk, county recorder, coroner and public administrator are officers whose powers and duties are given by the county government act, or by other general laws, and do not derive any authority from the consolidation act, or exercise any function in the municipal government of San Francisco. *These officers are therefore county officers, and their term of office, as well as the time of their election, are those provided by the county government act.*"

The coroner of the city and county of San Francisco has been held to be a county officer and the general laws are just as applicable to him as to any other coroner in the state.

Kuhlman v. Superior Court, 122 Cal., 636.

SOME MISSOURI CASES.

It is also instructive to examine the decisions of the Supreme Court and of the Court of Appeals of Missouri, under somewhat similar constitutional provisions.

In St. Louis under the consolidation scheme of the city and county of St. Louis, the charter, when adopted, "became the organic law" and "took the place and superseded the charter of St. Louis and all amendments thereof and all special laws relating to St. Louis, inconsistent with such scheme."

State v. McKee, 69 Mo., 504, 506.

It was held by the Supreme Court of Missouri, that as the election of constables, who it held, were state officers and not municipal officers, was provided for by the general laws, an ordinance of the city of St. Louis passed after the consolidation, was unconstitutional and void, the court saying:

> "The constable is not a city officer. He is a state officer. His is an office created by general law for every township in the state and every ward in the city. He is a state officer in the same sense that sheriffs and clerks of courts of record are state officers and that judges of inferior courts are state officers, although they can only discharge the duties of their respective offices within a limited territory and not throughout the state."

State v. McKee, 69 Mo., 504, 508-9.

Another case held that while St. Louis is not by name a county nor within the limits of any county, it is, for many purposes, throughout the statutes, treated as a county.

State v. Dillon, 87 Mo., 487, 491.

From the same opinion we learn, that the county officers were elected at the general November election, while municipal officers were elected at another time, in April, the court stating, on page 490:

> "The city of St. Louis, in April of designated years, elects its municipal officers, among whom are the mayor and members of the city council. *These officers then elected are strictly city officers.*"

And on page 491, in the same opinion, the court says:

> "At the general November election there are elected within the corporate limits of the city various state officers generally designated county officers, i. e. public administrator, clerks of courts of record, recorder of deeds, sheriff, coroner and some others."

Another case in Missouri, held that the sheriff was still a county officer, using the following language:

> "The sheriff of St. Louis county is a state officer, differing in his functions in no essential from any other sheriff in the state. The rules of law generally applicable to

> sheriffs, apply to him, and he does not become a city officer because the territorial subdivision of the state, constituting his bailiwick, is called a city rather than a county."
>
> State v. Finn, 8 Mo. App., 341, 347.

This last quoted case also states that in all matters of local concern the people of St. Louis are governed by their charter.

> *Idem*, pages 350, 352.

In another case the Supreme Court of Missouri affirmed the case last cited and others to similar effect, and said:

> "While the city of St. Louis is strictly a municipal corporation, its territory is also a subdivision of the state, in which officers are elected to perform the functions of the state government, as distinguished from those pertaining to municipal government. Those officers are in no sense municipal officers. Their designation as officers of the city of St. Louis refers to their territorial jurisdiction, rather than to the governmental duties they perform. They are officers under the laws of the state and perform their duties within the city limits."
>
> State v. Bus., 135 Mo., 325, (33 L. R. A., 616, 619).

Under the Missouri decisions, the constitutional provisions authorizing cities like St. Louis and Kan-

sas City to frame their own charters, are held to imply the power to adopt a complete and harmonious system of local municipal government, but it has been again and again held by both the appellate court and the Supreme Court of that state, that such right to frame and adopt charters did not authorize them to change the policy of the state as declared by the Constitution or general laws.

In the case of Kansas City v. Oil Co., 140 Mo., 458, 471-2, the court said:

> "A charter is the organic law of a city in this state whether it emanate from the general assembly, or is framed and adopted by the people of the municipality by authority of the Constitution. Being a law for the government of the municipality, it is binding upon all courts, and it violates no principle of our government to say that the courts, when called upon must enforce these municipal laws unless they conflict with the Constitution, and are not in harmony with the Constitution and laws, and, as already said, mere differences in details do not render such laws inharmonious. So long as Kansas City under its special charter does not invade the province of general legislation, or attempt to change the policy of the state as declared in her laws for the people at large, it will not be held to be out of harmony with such laws, notwithstanding the provisions of the special charter may be different from the general statutes pre-

scribed for the government of other cities in their local affairs."

In the case of State v. Police Commissioners, 80 Mo. App., 206, 216, the court held that:

> "While much important governmental power concerning matters of strict municipal or local concern may be legally embodied in the charter, yet the charter must remain in subjection to the general law. This is constantly iterated by the Supreme Court in what are known as the Park cases. Kansas City v. Oil Co., 140 Mo., 458; Kansas City v. Ward, 134 Mo., 172; Kansas City v. Scarritt, 127 Mo., 642. In the Oil Company case it is said that whenever a charter so framed comes under judicial review the inquiry is, is it in harmony with and subject to the law of the state. *It is there further said that the charter must not invade the province of general legislation, or attempt to change the policy of the state.* In respect to all matters involving the relation of the city to the state and the full exercise of what is commonly known as the police power of the state, the act of legislature will annul provisions of such a charter on the same subject. St. Louis v. Dorr, 145 Mo., 466."

And on page 218 of the same opinion, the court said:

> "That the charter can not change the state law in this respect is apparent, unless we set up the charter as superior to the state law. To grant such potency to the charter, we would be brought to the position, as stated by the Supreme Court * * * that a wholly different system of police could be introduced by the city, or, indeed, none at all; and thus the policy of the state be subverted."

This case involved the question of certain charter provisions relating to the police, where by state law the metropolitan police system was in force, which law, the Supreme Court said, "makes a policeman an officer of the state as well as of the city."

Idem, page 219.

And then went on to say that

> "The law establishing the police commissioners and the system of police under them is an evidence of the policy of the state with reference to the police of one of its principal cities, and it can not be subverted by a local charter."

Again, the Supreme Court of Missouri, in a recent case, in speaking of the purposes of the constitutional provision to give St. Louis and other cities the benefit of home rule, just as was intended by article XX of the Colorado Constitution, says that:

> "Looking at these constitutional provisions, together, it is plain that it was the

purpose of the Constitution of 1875 to grant to St. Louis and other cities and localities the benefit of 'home rule,' so far as it was possible, but it was not intended to abdicate state sovereignty over them, nor to raise them higher in authority than the state of which they form a part."

State v. Lindell Ry. Co., 151 Mo., 162, 182.

SOME WASHINGTON CASES.

So, too, in the state of Washington cities of certain size have power to frame their own charters, but it was held that such charters could not provide for eminent domain proceedings, and the Supreme Court said:

"Because the Constitution permits certain cities to frame charters for their own government, is no sufficient reason for assuming a branch of the sovereignty of the state which has no element of municipal government in it, and the provisions of the charter must therefore be held to be void."

Tacoma v. State, 4 Wash., 64, 66.

These cases from California, Missouri and Washington (the three states other than Colorado where the state Constitution grants to cities the right to make charters), all show that the right to frame a charter, granted by the Constitution of a state to cer-

tain cities, is never construed to give them a right to infringe upon the power of the state as a whole, or to change the policy or scheme of state or county government, but that such charters are confined strictly to those matters which are distinctly municipal and of purely local concern.

The constitutional permission to municipal corporations to frame their own charters, therefore, does not give the right to the charter convention to legislate as to state or county officers, their election term of office, or jurisdiction, but only as to local or city officers and affairs. For example, such a constitutional provision does not permit a municipal charter convention to legislate as to the jurisdiction or duties of a state court, or to prescribe the manner in which a state court should transact its business. This was distinctly decided in the following Washington cases:

Fawcett v. Pritchard, 14 Wash., 604 (33 L. R. A., 674, 675-6).

Howe v. Barto, 12 Wash., 627.

SOME COLORADO CASES.

In Colorado the city council of Leadville attempted some years ago to confer certain powers upon the police judge, who had been elected under the authority conferred by the general statutes; they also attempted to prescribe the form of procedure, the general statute having failed to define his jurisdiction or powers or prescribe the procedure, but the Supreme

Court held that such ordinance was unconstitutional and void.

That case is interesting and instructive, because the question there involved was as to the power of the municipality to confer upon a court whose duties concerned the policy of the state at large and the general public any powers or jurisdiction whatever, or to legislate in any particular as to such court. That court, as are all courts under our Constitution, was a part of the judicial machinery of the state.

Moreover, in that case there was no express grant to the city council of Leadville to legislate as to the police magistrate's court; but it was argued that as the general statutes provided that a police magistrate should be elected by the electors of such a city, and were silent as to his jurisdiction and duties and the procedure of his court, therefore the power to define his jurisdiction, etc., was necessarily implied as vested in the city council of Leadville.

The reasoning in the decision of this court in that case is quite pertinent to the case at bar. The Colorado Supreme Court says:

> "We have already seen that, not being a justice of the peace, he could assume the authority of such an office only by usurpation, and certainly it can not be contended that the municipal authorities of Leadville can confer statutory powers upon an officer of their own election, for whom no statutory powers have been prescribed by the legislature, even although they may have been fully empowered by the statute to elect such officer merely.

"The city council possesses no lawful power to legislate for such purpose. And this consideration applies to the powers sought to be conferred upon the defendant by municipal ordinances."

* * * * * * * *

"After authorizing the appointment of police judge by the town council of cities of the second class, the legislature stopped short of conferring authority to go further. *An obvious reason for this is found in the constitutional provision already cited, requiring uniformity in the jurisdiction and practice of all courts of the state of the same grade or class.* Such an uniformity could not be made possible, were the local authorities of each town and city vested with the power of establishing courts, and prescribing the jurisdiction and practice of its judicial officers, each having a local and limited jurisdiction, each likely to be as distinct as the diverse character of the different towns for which they were created, and therefore necessarily *sui generis.*

"It can scarcely admit of doubt that all courts and judicial officers in contemplation of the Constitution are to be created, established, limited, and the exercise of their powers provided for by general law emanating from the legislative authority of the state. A popular but mistaken impression prevails to some extent, that all civil officers whose duties embrace municipal laws, ordi-

nances and regulations are purely local or municipal in their character, and have no general relation to the body politic of the state.

"*It must be borne in mind that there is a legal distinction between state officers, that is, officers whose duties concern the state at large, or the general public, although exercised within defined limits, and municipal officers strictly, whose functions relate exclusively to the particular municipality.*

" 'The administration of justice, the preservation of the public peace and the like, although confined to local agencies, are esentially matters of public concern, while the enforcement of municipal by-laws proper, the establishment of gas works, of water works, the construction of sewers and the like, are matters which pertain to the municipality as distinguished from the state at large.' Dillon on Municipal Corporations, sections 33, 34, 773."

* * * * * *

"It thus appears to be clearly established that the administration of justice, the preservation of the public peace, and the protection of the rights of the citizen, although confided to local agencies, are essentially matters of public concern, while the enforcement of municipal by-laws and regulations, as above illustrated, are matters which pertain to the municipal corporations merely as distinguished from the state at large.

"Under the construction we are constrained to put upon the Constitution and statute law of our state, and the application of the principles laid down in the authorities above cited, we are led to a conclusion that the office of police judge, as denominated in sections 2714 and 2790 of the General Laws, can only be established and fully equipped for service by the legislature of the state; that such officer is not the creature of the municipal authority of a city or town; that such municipal authority can not invest the office with any powers or functions of its own creation. It has no power to confer jurisdiction or prescribe a mode of practice and procedure for a court or any judicial officer, which can only be done by the express provision of general law, nor can it, in respect of a police judge created under the provisions of the statute referred to, clothe such officer in the habiliments of a justice of the peace, or any other judicial officer whose magisterial garb has been made by the legislature expressly for the latter's use."

People ex rel. Howell, etc., v. Curley, 5 Colo., 412, 418, 419-420, 421-422.

To the same effect see, also, the cases of

People v. Hurlburt, 24 Mich., 82.

Burch v. Hardwick, 30 Grat., 24.

AS TO TIME OF ELECTION.

The charter can not provide for a time of election of county officers different from that provided for those of other counties by the Constitution, for there is no express provision in article XX authorizing it to do so, nor is there any express statement in article XX showing that it was by that article intended to change for the city and county of Denver the time of the election or the beginning or ending of the terms of office for those officers who are properly designated as county officers. It is well settled that the Constitution should be construed as a whole to prevent conflict and harmonize the whole.

People ex rel. Livesay v. Wright, 6 Colo., 92, 95.

Lamborn v. Bell, 18 Colo., 346.

In re State Lands, 18 Colo., 359, 364.

People ex rel. Bentley et al. v. Le Fevre et al., 21 Colo., 218, 233.

The Constitution (section 8, article XIV, both formerly and as amended) does, however, expressly provide for the election of a county treasurer who shall be collector of taxes, and for the election of the sheriff, the coroner, the county clerk, superintendent of schools, the assessor and justices of the peace and constables, etc., placing the time of their election at the same time members of the general assemly are elected.

Colorado Constitution, section 8, article XIV.

3 Mills' Annotated Statutes of Colorado (Rev. Suppl.), section 483, page 37.

It requires no citation of authorities to show that with this express provision as to the time of election of county officers putting it at November of each biennial period, any act of the general assembly attempting to change the time of such election would be unconstitutional and void, and what the legislature can not do, the charter convention of the city and county of Denver certainly can not do.

The attempt, therefore, of the charter of the city and county of Denver to provide for the election of a county treasurer, sheriff, county assessor, justices of the peace, etc., on May 17, 1904, and to change the beginning and expiration of the terms of such officers, is unconstitutional and void. It has been held that an election held at a time not authorized by law is void.

Kimberlin v. State, 130 Ind., 120.

Brewer v. Davis, 9 Hump., 208.

State v. Washoe Co., 6 Nev., 104.

Boone v. State, 10 Tex. App., 418.

10 Am. and Eng. Ency. of Law (2nd Ed.), 679.

As an act of the legislature changing the time of an election as fixed by the Constitution is unconstitutional and void; *a fortiori* a municipal charter.

Smith v. Askew, 48 Ark., 82.

10 Am. and Eng. Ency. of Law (2d Ed.), 680 and 681.

Paine on Elections, section 310.

The election on May 17, 1904, therefore, being held at a time not authorized by the Constitution, was unauthorized and void.

PLAINTIFF IN ERROR ESTOPPED.

It is alleged in the complaint filed against the plaintiff in error in the trial court that he participated in the election of November 8, 1904, at which election the relator, Badgley, was his opponent (see Printed Transcript of Record, page 2), but, notwithstanding such participation in that subsequent election, he now, having been defeated, claims title to the office by virtue of the prior city election of May 17, 1904, and contends that the November election was without authority of law.

In Morris v. The People, 8 Colo. App., page 375, the court decided that an officer who participated in an election for a successor and is himself an unsuccessful candidate for re-election, should be estopped to claim that the election was held without authority of law. We quote from the opinion, page 380, as follows:

> "But the position taken by Morris in this litigation is at least equivocal. He submitted his claim to the office to the voters of the precinct, and they rejected it. He was a candidate against the relator; he took an active part in the election, and the result was unfavorable to him. He does not seem to have entered the contest with any intention of abiding the event unless it should be satisfactory to him. If he was successful, he could hold the office by virtue of the election. If he failed, he could repudiate the election and hold the office by virtue of his former commission, on the ground that no successor had

been legally chosen. The law does not regard a position like that with favor."

The plaintiff in error, Elder, having submitted his claim to the office of county treasurer to the voters at the election of November 8, 1904, is therefore under Colorado decisions estopped from disputing the validity of such election.

See, also,

People ex rel. v. Waite, 70 Ill., 25.

People ex rel. v. Moore, 73 Ill., 132.

AS TO THE SCHEME OF GOVERNMENT.

Counsel for plaintiff in error use a very considerable portion of their brief in an endeavor to show that the scheme of government which they support is not subversive of a republican form of government.

As I have before said, I do not regard that question as involved in this case. It is true that the Supreme Court of Colorado did, as a matter of argument, in the first case in which the construction of article XX of the Colorado Constitution was before it, say, in effect, that, if it were to be given the construction contended for by counsel for the respondent, Sours, it would be repugnant to the Constitution of the United States, and reiterated it in the case at bar.

People ex rel. Elder v. Sours, 31 Colo., 369, 385-7.

But in the above case the court expressly sustained the contention of counsel for petitioner, Charles S. Elder, and held that article XX must be construed

> "as a whole, in view of its expressed purpose, of securing to the people of Denver absolute freedom from legislative interference *in matters of local concern*."

and then added that,

> "*so considered and interpreted*, we find nothing in it subversive of the state government, or repugnant to the Constitution of the United States." Ibid., page 387.

In that case the plaintiff in error here, Charles S. Elder, was the petitioner and the real party in interest. The court sustained his contention that it was not unrepublican, and the respondent, Sours, did not bring that case to this court in error as involving a federal question. The decision in that case remains the law of the state of Colorado as to the construction of article XX of our state Constitution. It has not only not been reversed, but it has since been repeatedly affirmed by that court. First in 1904, in

> Parsons v. People, 32 Colo., 221, 240.

Again, in 1905, in

> People ex rel. Attorney-General v. Johnson (Colo. Sup. Court), 86 Pac. Rep., 233.
>
> People ex rel. District Attorney v. Elder (Colo. Sup. Court), 86 Pac. Rep., 250,

which latter case is the one in which we are now interested.

People ex rel. District Attorney v. Alexander (Colo. Sup. Court), 86 Pac. Rep., 249.

People ex rel. District Attorney v. Berger et al. (Colo. Sup. Court), 86 Pac. Rep., 250.

People ex rel. District Attorney v. Armstrong (Colo. Sup. Court), 86 Pac. Rep., 251.

People ex rel. District Attorney v. Rice et al. (Colo. Sup. Court), 86 Pac. Rep., 251.

People ex rel. District Attorney v. Lawson et al. (Colo. Sup. Court), 86 Pac. Rep., 251.

Byrne v. People ex rel. District Attorney (Colo. Sup. Court), 86 Pac. Rep., 250.

People ex rel. District Attorney v. Horan (Colo. Sup. Court), 86 Pac. Rep., 252.

In three other cases decided at the same term, in 1903, as the original case, it was affirmed in principle though without specific mention of the case by name.

People ex rel. Attorney-General v. Adams et al., 31 Colo. 476, 480.

It would seem, therefore, that the Supreme Court of Colorado had given full consideration to the con-

struction placed by it upon article XX in these repeated decisions.

The Court of Appeals of Colorado in a decision rendered after the case of People ex rel. Elder v. Sours, 31 Colo., 369, followed the same construction, and approved of the doctrine there announced.

McMurray v. Wright, Mayor, et al., 19 Colo. App., 17, 25.

If it were necessary to consider in this argument the question whether, if the construction now given by counsel for Mr. Elder to article XX were permitted, it would result in authorizing a form of government which would be unrepublican, we believe that we could conclusively demonstrate that it would be. Not only does the reasoning of the cases heretofore cited sustain us, but we could cite many more.

It will be conceded that under our form of government and laws the only body in which *plenary* power to legislate is reposed is the legislature of a state, and that is true only where there are no constitutional prohibitions. All legislative bodies, other than state legislatures, can legislate only upon those matters as to which they have been given authority, either by the Constitution, or by a statute authorized by the Constitution. Even the congress of the United States has only constitutionally enumerated powers.

The fact that a municipal corporation is created by constitutional grant, instead of by legislative grant, is wholly unimportant and does not clothe it in any of the attributes of sovereignity, or with any powers of greater scope than a legislative charter, save only that the legislature may not by statute diminish the

authority granted by article XX. That article is the measure of all authority in the municipality, is the source of its powers, it may not rise above that; and there is nothing in article XX that changes the cardinal rules of law relating to the interpretation of its provisions by the courts, confining the administrative and ministerial operations of the city within the strict letter of the article.

The surrender by the state of its control of government in any portion of the state, whether permanent or temporary, is intolerable in a republican form of government; and a local community, while it may be intrusted with powers of local self-government, may never be safely intrusted with sovereign powers.

Cooley Const. Lim. (7th Ed.), 69, 266, 271, 309, 400.

Ex parte Wall, 48 Cal., 279, 313-314.

If the charter of the city and county of Denver can legislate on state policies and matters for the territory comprised within its boundaries, freed from all control by the state, then Denver would be a state itself, possessed by the sovereign powers of a state, in other words, we should have within the outer boundaries of the state of Colorado a state called Denver, separate and apart and independent from our state of Colorado, organized and established in direct violation of article IV of the Constitution of the United States.

But, as I have before said, the Colorado Supreme Court did not give to article XX of the Colorado Constitution the interpretation claimed by plaintiff

in error, and did not hold that either article XX, or the charter of Denver framed under that article, was in conflict with the federal Constitution, but on the contrary held that the charter was in conflict with the Colorado Constitution, and that article XX (an amendment of that Constitution) did not grant to the city the powers claimed by plaintiff in error. The judgment of the Supreme Court of Colorado is not therefore subject to review.

CRITICISM OF CASES CITED BY PLAINTIFF IN ERROR.

In an endeavor to lessen the effect of the case of Kahn v. Sutro, 114 Cal., 316, quoted earlier in this brief, which authority was also cited by me in the court below, counsel refer, as they did below, to two subsequent cases in California, namely, Martin v. Board, 126 Cal., 404, and Crowley v. Freud, 132 Cal., 404. An examination of the California Constitution will show that, while certain cities in California have the constitutional right to elect members of a freeholders' convention, which convention may frame a local charter, that it is necessary after the charter has been submitted to the people and adopted by a majority of the votes cast at an election thereon that "*it shall thereafter be submitted to the legislature for its approval or rejection*," and that "if approved by a majority vote of the members elected to each house, it shall become the organic thereof," etc.

California Constitution, section 8, article XI.

This requirement that the charter shall be approved by the legislature, which represents the sovereignty of the state as to legislation, retains over any and all cities in California framing such charters the sovereign control of the state, and upon the approval of the legislature it becomes to all intents and purposes an act of the legislature.

That is essentially different from the position taken by counsel as to the Denver charter and as to the construction of article XX of the Colorado Constitution. These two California cases do not, therefore, sustain counsel's contention, for there the state still maintains its sovereign control over the charter and so over the municipality. But in Colorado counsel say that, although the charter adopted by the people of Denver does not have to be submitted to the legislature for approval or rejection, and although the legislature has no control over it, yet the charter may legislate as to county and state governmental affairs and policies within the boundaries of the city.

It took even in California an amendment to their Constitution expressly authorizing the charter to provide for the election of county officers before it could be done there. This is shown from the cases cited. But, even then, the state maintained its sovereign control over it, for that charter had to be approved by a majority vote of the members elected to each house of the legislature before it became the charter of the city.

But even in Crowley v. Freud, 132 Cal., 440, the latest case cited by counsel, although the amendment to the California Constitution granted express power

to the charter convention to embody in the charter provisions as to

> "the manner in which, times at which, and the terms for which the several county officers shall be elected or appointed, for their compensation and for the number of deputies that each shall have, and for the compensation payable to each of such deputies."

yet, as it did not expressly grant the power to the charter convention to embody in the charter what the qualifications of such deputies should be, the court held that the charter convention had no such power, and that, too, notwithstanding such charter had to be approved by the legislature before it would be in force.

So it is conclusively shown that the California cases cited by plaintiff in error do not sustain him.

The provisions of article XX of the Colorado Constitution are materially different from those of the California Constitution, in that the charters authorized by our Constitution do not have to be approved, or even submitted, to the legislature, and so can not, of course, ever be rejected by the legislature.

The Supreme Court of Colorado was therefore correct in holding that under our Constitution no city has the right to legislate as to matters affecting state or county officers, or state policies, or affairs, and that

> "even by constitutional amendment the people can not set apart any portion of the state in such manner that that portion of the state shall be freed from the Constitution, or

delegate the making of constitutional amendments concerning it to a charter convention, or give to such charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from municipal or city government."

People ex rel. Elder v. Sours, 31 Colo., 369, 385.

Counsel for plaintiff in error next cite, on page 73 of their brief, the case of City of St. Louis v. Western Union Telegraph Co., 149 U. S., 465, and quote these two sentences from page 467 of the opinion:

> "The city is in a very just sense an '*imperium in imperio.*' Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter."

An examination of that opinion discloses two things, (1) that this was said of those provisions of the charter of St. Louis which related to purely local and municipal affairs, namely, the control of the city over the streets of the city; and (2), that the general assembly of Missouri has "the reserved control" over the city and the charter adopted by it.

That is a very different condition from the case at bar, where the provisions of the charter of Denver involved do not relate to local or city affairs, but to county and state governmental matters; and, moreover, according to counsel's argument, there is no re-

served control existing in the general assembly of Colorado.

So far as relates to strictly city affairs, the city may be granted by the Constitution absolute freedom from legislative control, and so in that sense (which I understand was the sense in which the expression was used in the above case), the city might be an *imperium in imperio*. But when it comes to legislation by the charter of a city on state policies and state affairs, then such attempted legislation would be unconstitutional, for there can be no delegation to a municipality of the complete sovereign powers of the state. In such a sense an *imperium in imperio* can not be tolerated.

The decision above referred to does not sustain plaintiff in error.

Counsel next cite, at page 74 of their brief, the case of Bowman v. Lewis, 101 U. S. (11 Otto), 22, and quote two sentences therefrom. We are in harmony with the decision in that case, and with the reasons given for the judgment.

In that case the question was whether the Missouri Constitution, which established a Court of Appeals for the county of St. Louis and certain other counties, with final jurisdiction of cases where the amount involved was $2,500 or less, while suitors in other counties had the right to appeal to the Supreme Court of the state in such case, was a denial of the equal protection of the laws guaranteed under the fourteenth amendment to the Constitution of the United States. This court very correctly affirmed the judgment of the Supreme Court of Missouri, and said that

> "there is nothing in the [federal] Constitution to prevent any *state* from adopting any system of laws or judicature it sees fit for all or any part of its territory."

But this court did not say, and I think never will say, that where the Constitution of a state expressly requires, as does section 28 of article VI of the Colorado Constitution, that

> "all laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts severally, shall be uniform,"

and where the Supreme Court of the state has, in interpreting that and other state constitutional provisions, held that no municipality of the state had power to legislate as to courts sitting within in the municipality and change the laws of the state in respect thereto, that such a decision by the state Supreme Court was erroneous, or that it raised a federal question. Such a question is one solely for the state court to decide. That is what the Colorado Supreme Court decided in the case of People ex rel. Attorney-General v. Johnson (86 Pac. Rep., 233), the opinion in which was made the basis of the decision in the case at bar, and is attached to and printed in the transcript of the record here. (See printed Transcript of Record, pages 21 to 32.)

It is apparent that Missouri has no such constitutional prohibition against local or special laws as to courts, but, on the contrary, their Constitution expressly and positively provided for them.

Counsel, at page 48 of their brief, refer to the case of Board of County Commissioners v. Rollins, 130 U. S., 662. We have no criticism of the rule of construction there announced. The Supreme Court of Colorado had not interpreted the constitutional provision there in controversy; the action was first instituted in the Circuit Court of the United States for the District of Colorado and the jurisdiction of the United States Court was invoked and attached by reason, evidently, of diversity of citizenship of the parties, and not on account of any federal question. Had the Colorado Supreme Court interpreted that section of the Constitution first, then, as no federal question was raised, this court would have held that it was bound by that construction. In the case at bar no federal question is involved, and this court has no jurisdiction to review the judgment—the interpretation by the Colorado Supreme Court of the particular constitutional provisions, and of the charter of Denver here involved must therefore control.

SOME GENERAL CRITICISMS OF COUNSEL'S ARGUMENT.

This brief has perhaps already been unduly extended, but the great importance of the questions involved on the merits of this controversy is my apology.

Counsel for plaintiff in error, in their brief here, do exactly what they, and other counsel for other parties, did in the court below—endeavor to draw a metaphysical distinction between "a function" and "a functionary." This distinction did not appeal to the Supreme Court, however, as it does not appeal to us. The function of an office does not exist merely in a name, as an abstract idea, but is an active, practical, exerted function; the agent exercising and executing it must in the nature of things exist, whether he be designated by the charter or not, else there is no state government within the territorial jurisdiction of the charter. Such an hiatus in the state government is permissible under counsel's construction, while under our construction it is impossible.

If opposing counsel's construction should be held to be correct, then upon failure by a charter convention to designate the officers in question there would be no such officers in existence, and the Constitution and statutes prescribing the jurisdiction and duties of county and state officers would be, within the limits of Denver, mere dead letters; in other words, there would be no state government in Denver. But under the construction given our Constitution by us, and the one sustained by the Supreme Court of Colorado, such a contingency is wholly impossible, because these offices and officers do and will continue to exist in every county of the state, Denver included. They exist in the city and county of Denver, whether designated by the charter or not, because they are created, not by the charter, but by the Constitution of the state.

Reliance is practically solely placed by counsel for plaintiff in error upon section 2 of article XX of

the Colorado Constitution, which they say makes an express grant of power to the framers of the charter to provide for the jurisdiction, term of office, duties and qualifications of *all* officers of or within the city and county of Denver, whether they perform purely city duties or state or county duties. But we say, in opposition to this, that this does not so provide, that counsel simply construe into the section the word "*all.*" Our contention is that this only refers to such officers of the city and county of Denver as are distinctly municipal in character and *as to such officers only* the charter may constitutionally legislate, that as to such officers the charter may make more or less in number than heretofore and may provide a different time of election and different term of office from that heretofore provided by the charters of Denver.

Indeed *opposing counsel practically concede* in their brief *that the charter can not fix or regulate the duties or acts of such officers as are commonly known as county officers* and that such an attempt on the part of the charter would be unconstitutional, but, they say, that this does not apply to the term of office or the time of election of such officers, and that the charter can constitutionally fix the term of office and the time of election of county officers so-called for terms different and times different from those provided by the Constitution for other counties.

In this connection we desire to call the court's attention to the fact that in section 3 or article XX, the officers of the city and county of Denver are practically classified into two groups; those officers whose duties are and always have been municipal purely are classified by themselves and those officers whose duties are and always have been distinctly governmental and

part of the county and state government are grouped and classified by themselves, for example:

> "The then mayor, auditor, council, etc., * * * shall *become respectively said officers* of the city and county of Denver and * * * the then clerk and ex-officio recorder, treasurer, assessor and coroner of the county of Arapahoe and the constables and justices of the peace, holding office within the city of Denver, shall *become respectively said officers* of the city and county of Denver * * * the foregoing officers shall hold the *said* offices as before specified only until their successors are duly elected and qualified *as herein provided for.*"

The words "*as herein provided for*" must be construed as referring to the entire Constitution. The municipal officers "as herein provided for," that is, as provided for in the Constitution, are in the city and county of Denver such as may be provided by the charter, and the county officers (who are distinctly made the same officers of the city and county of Denver and by this section made to hold until their successors are elected), "as herein provided for," are the county officers named in the Constitution, and whose election is provided for in the Constitution at the same time as all other county officers in other portions of the state. This section 3, therefore, distinctly recognizes the essential difference between municipal officers and county officers as still existing in the consolidated territories, and provides that municipal officers may be such, and their terms of office, etc., such

as may be provided in the charter, and that county officers shall be such, and their time of election, etc., such as provided by the Constitution and the general statutes. It is clear, therefore, that the charter provisions above referred to are unconstitutional.

We desire also to call attention to the last sentence in section 1 of article XX, which is that "the city and county of Denver shall alone always constitute one judicial district of the state."

If, then, opposing counsel's argument be sound that section 2 confers authority for the charter framers to provide a different scheme of government for the city and county of Denver from that required by the Constitution for other counties of the state, then because article XX provides that the city and county of Denver shall alone always constitute one judicial district of the state and also that the officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter it would give to the charter framers the power to legislate as to the district judges and district attorney, the time of their election, their jurisdiction and their duties, and the fact that other portions of the Constitution (Colorado Const., section 28, article VI) provide for a uniform system of courts and judicial procedure would not, according to their theory, make any difference. In short, carried to its logical conclusion, the argument of opposing counsel would permit the charter of the city and county of Denver to entirely change the judicial system of the state within the city and county of Denver, the number of judges of the district court, the number of district attorneys, fix a different time for their respective elections and a

different term for their respective officers, notwithstanding the express and mandatory provisions of section 28 of article VI of the Constitution.

If, as counsel contend, it be sufficient for the charter to simply designate certain officers who shall perform county and state functions, then what would become of the power of the state in its sovereign capacity to compel, under penalty of removal from office, the performance by its officers of either state or county duties? If the office does not exist by name, then there can be no removal from such office upon conviction for malfeasance, misconduct, oppression, embezzlement, etc., as provided *co nomine* in the case of county clerk, recorder, sheriff, coroner, constables, county commissioners, justices of the peace, county surveyor, county judge, county treasurer, assessor, etc., by 1 Mills' Anno. Stats., section 1303, and 2 Mills' Anno. Stats., section 3309. Nor can the assessor be removed by the governor, as provided by section 91, on page 90, of the Colorado session laws of 1902. Nor can the county treasurer be removed for failure to account for state revenue on the certificate of the state auditor, as provided by 2 Mills' Anno. Stats., section 3876; nor the county judge, justices of the peace, county clerk, sheriff, constables, etc., for taking reward for omission of duty, as provided by 1 Mills' Anno. Stats., 1302; nor the county treasurer for failing to pay over military poll tax, as provided by 2 Mills' Anno. Stats., section 3087.

If counsel for plaintiff in error are correct in their interpretation of our Constitution (the Supreme Court of Colorado has held, however, that they were not), then the state would be powerless to

compel the above named county officers to perform their state duties. Such an anomalous condition can not, of course, be permitted, at least, by construction.

Counsel say at page 50 of their brief that "the charter of the city and county of Denver must designate of its officers those who shall perform these duties," meaning county and state duties. But suppose it does not, what then? The charter convention can not be compelled to reconvene and designate such officers, for it has become *functus officio* the moment it has completed the charter, or the sixty-day constitutional limit of its session has arrived, and surely after the people have voted on the charter. The electors of the city and county of Denver can not be compelled in any judicial proceeding to designate such officers, and so the sovereign state is helpless, according to counsel's theory. It will not do to say that no charter convention would fail to designate such officers, for we know that the present charter, under which plaintiff in error claims, failed to designate any officer to perform more than twenty (20) duties required to be performed by county clerks under the general laws, and that at least twenty such duties are not assigned to any official under the present charter. Among the most important of these are: The issuing of marriage licenses (2 Mills' Anno. Stats., section 2992; 3 Mills' Anno. Stats., Rev. Suppl., section 2992); the authentication of a justice's execution to another county (2 Mills' Anno. Stats., section 2671); the authentication of a judgment of a justice when it is to be used as evidence to another county (1 Mills' Anno. Stats., section 1747); the approval of bonds of notaries public (2 Mills' Anno. Stats., section 3282); the giving of notices of the meeting of the county board

of equalization (2 Mills' Anno. Stats., section 3825); the distribution of copies of the Session Laws (2 Mills' Anno. Stats., section 3675); the reporting after a session of a legislature the number of persons entitled to laws (2 Mills' Anno. Stats., section 3677); certification of list of jurors to clerk of District Court (3 Mills' Anno. Stats., Rev. Suppl., section 2603); distribution of blanks of state board of health (3 Mills' Anno. Stats., Rev. Suppl., section 3602); filing for public inspection all the legislative journals (3 Mills' Anno. Stats., Rev. Suppl., section 2073b); receiving of claims of citizens against foreign corporations (3 Mills' Anno. Stats., Rev. Suppl., section 499), and numerous others.

I have not had the time to examine the omissions in the present charter of the duties of other officers, but these serve to illustrate the danger and to expose the fallacy of counsel's argument.

AS TO THE JUDGMENT ON DEMURRER.

It should be remembered that this proceeding was instituted in the trial court below under chapter 27 of the Colorado Code of Civil Procedure (Mills' Anno. Code, section 289), which provides three ways in which an action for usurpation of an office may be brought.

The section referred to is as follows:

> "An action may be brought by the district attorney in the name of The People of the State, upon his own information, or upon

> the relation and complaint of a private party, against any person who usurps, intrudes into or unlawfully holds or exercises any public office, civil or military, or any franchise within his district in the state, and it shall be the duty of the district attorney to bring the action whenever he has reason to believe that any such office or franchise has been usurped, intruded into or unlawfully held, or exercised by any person, or when he is directed to do so by the governor, and in case such district attorney shall neglect or refuse to bring such action upon the complaint of a private party, such action may be brought by such private party upon his own relation, in the name of The People of the State."

This case was brought under the second class by the district attorney, upon his own information and the relation of a private individual, who claims to be entitled to the office.

There are, therefore, three parties interested in this action, namely, the People of the state of Colorado, suing through their regularly constituted prosecuting officer, the district attorney, for a judgment of ouster to remedy a public wrong, and also the private relator and plaintiff, Badgley, seeking in addition to the judgment of ouster, a judgment declaring him entitled to the office alleged to be usurped, and the third party is the defendant, the plaintiff in error, against whom both the People and the private relator seek judgment and relief. The People, even in a Code proceeding, when suing in the sovereign capacity of

the state, as is the case here, do not have the burden of proof, but the burden both in pleading and in proof as against the People is upon the defendant or respondent, and to that extent the old common law procedure of pleading and practice still prevails.

People ex rel. Saunier v. Stratton et al., 33 Colo., 464, 466.

Lyons & E. P. Co. v. People, 29 Colo., 434, 436.

High's Ext. Legal Rem. (3rd Ed.), section 712.

As against the People, therefore, even under the Code, the defendant must justify and establish his own title to the office, for

> "when the information is filed by the state upon the relation of the person claiming to be injured by the usurpation, the relator joining with the state, if the pleading show a good cause of action in favor of the state, a demurrer will not be sustained because it does not appear that the relator is not entitled to the office."

High Extra. Legal Rem. (3rd Ed.), section 713, page 670.

State v. Palmer, 24 Wis., 63.

This he did not choose to do, but demurred to the complaint, thereby making his justification upon the law based upon the admitted facts alleged in the complaint.

The Supreme Court was therefore right in reversing the judgment of the District Court, which sustained the demurrer and dismissed the complaint, and as the questions involved were purely those of law relating to the construction of the Colorado Constitution, the Supreme Court entered final judgment in favor of the defendants in error here.

IN CONCLUSION.

We submit that as the Supreme Court of Colorado in passing upon the questions herein involved merely interpreted the Constitution of its own state, harmonizing all of its various provisions, and that, though in so doing it did argumentatively refer to the federal Constitution and the enabling act of congress, yet no federal question is necessarily involved, and that if there is, there was other matter adjudged broad enough to sustain the judgment, and, further, that as the judgment was manifestly correct, it should be affirmed.

Respectfully submitted,

HENRY J. HERSEY,
Counsel for Defendants in Error.

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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 132.

CHARLES S. ELDER, PLAINTIFF IN ERROR,

v.

THE PEOPLE OF THE STATE OF COLORADO ON THE INFORMATION OF GEORGE STIDGER, THE DISTRICT ATTORNEY OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO, ON THE RELATION OF CHARLES W. BADGLEY.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

HENRY J. HERSEY,
Counsel for Defendants in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24283

(19,931.)

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SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

I desire to call the court's attention to some further authorities pertinent to the questions involved in this case and to add my criticism of certain cases cited by the plaintiff in error upon which he seems to rely as supporting his claim of jurisdiction in this court.

As to the Question of Jurisdiction.

In discussing this question in my first brief I showed that the decision and judgment here complained of was made upon the doctrine of *stare decisis* (see pages 7 to 9 of my first brief and also pages 64 to 66 thereof). This court

has repeatedly held that in such cases this court has no jurisdiction and is concluded by the decision of the State court. All that the Supreme Court of Colorado did in the case at bar, as disclosed by the opinion printed in the transcript of record here (pages 21 to 32), was to found its judgment herein upon previous State adjudications upon provisions of its State constitution which had become settled rules of jurisprudence.

This not only does not give this court jurisdiction, but, on the contrary, conclusively shows that the court has no jurisdiction of this cause. Even though, in the opinion of this court, the court below erred in its construction of the State constitution and of the charter of Denver, and, moreover, even though the views expressed by our Supreme Court should be in conflict with views expressed by this court in other cases (which we deny), yet neither of those facts, nor both of them, would give this court jurisdiction.

Out of many cases which sustain these propositions we refer to the following:

Where a State court founded its judgment upon a State constitutional provision and prior State adjudications, this court cannot take jurisdiction over such judgment.

Bank v. Bank, 13 Wall., 432.

"If this court were to assume jurisdiction of this case, it is evident that the questions submitted for our decision would be, not whether the statutes of Ohio are repugnant to the Constitution of the United States, but whether the Supreme Court of Ohio has erred in its *construction of them.* It is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."

Bank v. Buckingham, 5 How., 317, 342-343.

The scope and meaning of a State statute as determined by the highest court of the State conclude the Federal Supreme Court in determining, on writ of error to the State court, whether or not such statute violates the Federal Constitution.

Smiley v. Kansas, 196 U. S., 447, 455.

And that, too, though the views expressed are not in harmony with those expressed by this court in other cases.

Ibid., 455.

"The Court of Appeals of Kentucky had an undoubted right to construe its own decision rendered in the case of Newport Light Co. against The City of Newport and The Dueber Company, and to declare what the judgment rendered therein really meant, and to define the scope thereof. *This neither raised nor presented any Federal questions whatever.*"

Newport Light Co. v. City of Newport, 151 U. S., 527, 538.

It should be remembered that questions involved in this cause were those relating to the extent and powers of a political and municipal corporation, the City of Denver, and that under the decisions of this court such questions are purely local and non-federal.

As was held by this court:

"It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

Claiborne County *v.* Brooks, 111 U. S., 400, 410.

For numerous other decisions to the same effect by this court see those cited in—

Forsyth *v.* Hammond, 166 U. S., 506, 519.

In the last-cited case this court said:

"It is for the State to determine its political subdivisions, the number and size of its municipal corporations, and their territorial extent. These are matters of a local nature, in which the nation, as a whole, is not interested, and in which, by the very nature of things, the determination of the State authorities should be accepted as authoritative and controlling. * * * And whenever the Supreme Court of a State holds that under the true construction of its constitution and statutes the courts of that State have jurisdiction over such matters, the Federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the Federal Constitution."

Forsyth *v.* Hammond, 166 U. S., 506, 518, 519.

As stated at page 10 of my first brief, when applied to the jurisdiction of this court over the decisions of State courts, the term "Federal question" is used in its narrowest and most restricted sense. The Federal questions must not only have been actually raised and presented to the court below, but must also have been necessarily involved, else this court has no jurisdiction; for, as stated by Chief Justice Waite in discussing a writ of error in case brought here from Virginia:

"Our jurisdiction over the decisions of the State courts is limited. It is *not* derived from the citizenship of the parties, *but from the questions involved and decided.* It must appear in the record, or we cannot proceed. We act upon questions *actually* presented to the court below, not upon such as might have been presented or brought into the case, but were not. The case, therefore, having been presented to the court below for decision upon principles of *general law alone,* and it nowhere appearing that the Constitution, laws, treaties, or executive proclamations, of the United States were *necessarily* involved in the decision, *we have no jurisdiction."*

New York Life Insurance Co. *v.* Hendren, 92 U. S., 286, 287.
United States *v.* Lynch, 137 U. S., 280, 285-286.

Plaintiff in error predicates his claim of jurisdiction in this court upon the proposition that the validity of an authority under the United States is involved (see page 23 of brief of plaintiff in error), and that the interpretation he puts upon the State constitution and the charter of Denver is too obviously correct to admit of doubt or dispute (see pages 32 and 48 to 51 of brief of plaintiff in error). But it will be seen from his argument and from the opinion of the State court of which he complains that his contention does not draw in question the validity of an authority under the United States, but at most, if anything, only the construction and application of regulations of the exercise of such authority. This has been held by this court not to give it jurisdiction.

As was said by the learned Chief Justice of this court in giving the opinion of the court in United States *v.* Lynch, 137 U. S., 280, 285-286:

"It is now urged that the duty of the Fourth Auditor and of the Second Comptroller, under the last clause of section 2 of the act of 1835 and the decision of this court in relation to it, was merely ministerial, and that by the disallowance of relator's claim for mileage these officers exercised a discretion which they did not possess; *that this was an invalid exercise of an authority under the United States, and that hence the validity of the authority was drawn in question.* In order to justify this position, however, the validity of the authority must have been drawn in question *directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed.* * * * *The contention of the relator is, that the interpretation he puts upon the act is too obviously correct to admit of dispute,* and that this court has so decided; but it does not follow, because the decision of the comptroller and auditor may have been erroneous, that the assertion of relator to that effect raises a cognizable controversy as to their authority to proceed at all. * * *

"*If we were to reverse that judgment upon the ground*

urged, it would not be for want of power in the auditor to audit the account and in the comptroller to revise and pass upon it, *but because those officers* had disallowed what they ought to have allowed *and erroneously construed what needed no construction. This would not in any degree involve the validity of their authority.*"

In support of the foregoing this court cites numerous earlier cases decided by it.

See also South Carolina *v.* Seymour, 153 U. S., 353.

It will be noticed that the relator in the Lynch case, *supra*, as does plaintiff in error here, earnestly contended that his interpretation was "too obviously correct to admit of dispute," yet this court held that did not give it jurisdiction, and said that because they "erroneously construed what needed no construction * * * would not in any degree involve the validity of their authority"—that is, the authority of the comptroller and auditor in the matter involved. If this is true of decisions of the comptroller and auditor, *a fortiori* it is true of State courts.

Very similar questions, at least so far as the jurisdiction of this court is concerned, it seems to me, were involved in two recent cases, not yet reported, in which the writs of error were dismissed for lack of jurisdiction.

No. 360, Rose *v.* Kansas, dismissed October 20, 1906.

No. 310, United States *v.* Taft, dismissed December 10, 1906.

At page 32 of his brief plaintiff in error, in support of his contention that "no untenable construction can be resorted to to defeat the jurisdiction of this court," cites Terre Haute R. R. Co. *v.* Indiana, 194 U. S., 579. That case was one where the question involved was solely whether a statute held by the Supreme Court of Indiana to be valid impaired the obligation of the contract of the railroad corporation which was plaintiff in error here; that furnished a clear

case of jurisdiction of this court. But the learned justice who wrote the opinion of this court expressly stated his doubt whether the decision of the lower court was based on "a wrong construction of the charter" of the railroad company or "on unconstitutional legislation," and adds: "We are of the opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws," thereby distinctly showing that jurisdiction was taken not because of a wrong or untenable construction (which this court has uniformly held, as in this brief before pointed out, could not give jurisdiction), but because the statute held valid was clearly void under the Federal Constitution because it impaired the obligation of the contract. But there is no contract in the case of a charter of a municipal corporation "in the sense of the constitutional provision which prohibits the obligation of contracts being violated."

Cooley's Const. Lim. (7th ed.), 268, 388.

The Indiana case, therefore, is not pertinent to the case at bar and does not sustain the claim of jurisdiction in this case.

Criticism of Cases on Jurisdiction Cited by Plaintiff in Error.

I desire now to show that none of the cases cited by plaintiff in error at pages 33 to 36 of his brief to support his claim of jurisdiction in this court do sustain it.

Luther v. Borden, 7 How., 1, 39, 40:

This court in that case did say that the question there involved was political and not judicial, and it further said (p. 40) that *"the point, then, raised here has already been decided by the courts of Rhode Island"* (*i. e.,* in the trial of Dorr for treason), and the point decided was that the charter

government of Rhode Island and its successor, the new constitutional government, was the only lawful government in Rhode Island, and that the Dorr government was illegal (see pp. 39 and 40). This court therefore rightly added to the above quoted statement that "*the question relates, altogether, to the constitution and laws of that State;* and the well-settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State."

And then this court immediately proceeds to ask the question, "Upon what ground could the circuit court of the United States which tried this case have departed from this rule, and disregarded and overruled the decisions of the courts of Rhode Island?" The opinion then shows that the circuit court of the United States could not disregard and overrule the State courts, and that, further, so far as the courts of the *United States were concerned, at least,* the question was political and not judicial.

So on both grounds this case is against plaintiff in error here.

Taylor v. Beckham, 178 U. S., 548, 570:

That case was a *quo warranto case* brought to this court by writ of error from the Court of Appeals of Kentucky, but it was *dismissed for want of jurisdiction.*

The two opening sentences of the opinion by the Chief Justice are both important and significant; he says:

"*It is obviously essential* to the independence of States, and to their peace and tranquillity, *that their power to prescribe the qualifications of their own officers,* the *tenure* of their offices, the *manner* of their election, and the grounds on which the tribunals before which, and the mode in which, said elections may be contested, should be *exclusive,* and *free from external interference,* except so far as plainly provided by the Constitution of the United States.

"*And where controversies over the election of State officers* have reached the State courts in the manner provided by, and been *there determined in accordance with the State constitutions and laws,* the *cases must necessarily be rare* in which the interference of this court can properly be invoked."

Boyd v. Thayer, 143 U. S., 135:

This case is not in point, because in it there were directly and solely involved certain provisions of the Federal Constitution and the acts of Congress enacted in pursuance thereof, to wit, the naturalization provisions, and this court therefore took jurisdiction and said that there was "involved the denial "of a right or privilege under the Constitution and laws of "the United States, upon which the determination of "whether Boyd was a citizen of the United States depended, "and jurisdiction to review a decision *against* such a right "or privilege necessarily exists in this tribunal."

This court then says:

"*Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen, and the title to officers shall be tried, whether in the judicial courts or otherwise.* But when the trial is in the courts, it is 'a case,' and if a *defense* is interposed under the Constitution or laws of the United States, and is *overruled,* then, as in any other case decided by the highest court of the State, this court has jurisdiction by writ of error."

This court later, in explaining the Boyd case, said in Taylor *v.* Beckham, 178 U. S., 548, 571, that it "took juris-"diction because the conclusion of the State court involved "the denial of a right or privilege under the Constitution "and laws of the United States, *upon which the determina-"tion of whether Boyd was a citizen of the United States or "not* DEPENDED, *and therefore jurisdiction to review a de-*

" cision against such right or privilege necessarily existed in " this tribunal."

In other words, the matters involved were solely an act of Congress and whether or not Boyd had complied therewith and had been denied a right or privilege under the Federal Constitution—purely Federal questions; it was not a case involving either the construction or validity of a provision of a State constitution or a State statute. It therefore is not a case in any particular analogous or pertinent to the case at bar.

Kennard v. Louisiana, 92 U. S., 480:

This was a case where plaintiff in error claimed that the Louisiana statute under which he was removed from office was in violation of the 14th amendment, because, he said, there was no "process" provided for; because he was denied a jury trial; because an appeal must be taken within one day after judgment, returnable to the Supreme Court within two days, and because judgment upon the appeal must be made final within one day thereafter.

It appears from the report of this case in the Louisiana reports (see 25 La. Ann., 238) that these so-called Federal questions were promptly and properly raised in the State courts, though overruled; so there was no question, as in the case at bar, as to plaintiff in error not having raised his alleged Federal questions; either at the proper time or at all. The question, therefore, of the jurisdiction of this court in that case was conceded and was not discussed by this court.

However, the *judgment* of the Louisiana court *was affirmed because* the *Federal questions* sought to be raised *were* held to be *without merit.* The case does not help plaintiff in error here.

In re Duncan, 139 U. S., 449:

This was a *habeas corpus* case, appealed from the Circuit Court of the United States for the Western District of Texas,

which court had dismissed Duncan's petition and denied the writ. *No question of the jurisdiction of this court over such an appeal was involved.* This court affirmed the judgment below.

At the close of the opinion this court says that—

"Whether certain statutes have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States, raises no Federal question giving the courts of the United States jurisdiction."

We fail to see wherein this case is an authority for plaintiff in error here; if it has any value as an authority in the case at bar, it is in support of our contention.

Texas v. White, 7 Wall., 700:

This was an original proceeding brought in this court by the *State of Texas* under the constitutional provision conferring original jurisdiction upon this court in cases in which a State is a party. *The question* was raised *whether Texas was at the time of the institution of that suit one of the States of the Union* within the meaning of the Constitution; and this court, having taken judicial notice of historical facts, acts of Congress, and of the President, held that it was, and then proceeded to decide the case upon its merits. *There is nothing in that case that concerns us here.*

Green v. Barney, 15 Wall., 610:

This case simply held that a certain provision of the Constitution of Georgia was in conflict with the Federal Constitution, in that it impaired the obligation of contracts, and was therefore void, and that recognition of such constitution by Congress did not oust the jurisdiction of the courts. Inasmuch as the Supreme Court of Georgia had held the provision constitutional, and so denied the plaintiff in error of

his contract rights under the Federal Constitution, there was and could be no question of the jurisdiction of this court. But no such condition as that exists in the case at bar, for there are no contract rights here involved, and the case therefore has no importance in this discussion:

From the foregoing criticism of the cases relied upon by plaintiff in error it is apparent that none of them sustain his claim of jurisdiction.

The cases we have cited we believe conclusively demonstrate that this Court has so often decided that in cases like the one at bar it has no jurisdiction that the writ of error herein allowed by the Chief Justice of the State Supreme Court should and ought to be dismissed.

A Charter Framed under a Constitutional Provision Has No More Force Than a Legislative Charter.

As stated in my first brief, Washington's constitution permits cities to frame their own charters, but in the first case that came before the Supreme Court of that State construing that provision of their constitution, that court said:

"A charter framed under the constitutional provision is of no more or larger force than a legislative charter and can lawfully treat *only* of matters relating to the internal management and control of municipal affairs."

So that court held the charter provisions establishing a police court in Tacoma unconstitutional; that was a matter for the State alone to legislate upon.

In re Cloherty, 2 Wash., 137, 139.

In a still later case the same court held that such a charter could not provide for contested elections.

State *ex rel.* Navin *v.* Weir, 26 Wash., 501.

The Sovereignty of the State Cannot be Bargained Away or Delegated.

Special reference to this is made in my first brief, at page 67 thereof, and I only desire to add a little more here, and to quote from that eminent constitutional lawyer and writer of recent times, Judge Cooley.

While the people in adopting constitutions have not thereby divested themselves of sovereignty, yet, as Cooley says:

"By the constitution which they establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law."
Cooley's Const. Lim. (7th ed.), p. 56.

And on page 892 of the same work he says:

"The voice of the people, acting in their sovereign capacity, can be of legal force only when expressed at the times and under the conditions which they themselves have prescribed and pointed out by the constitution, or which consistently with the constitution, have been prescribed and pointed out for them by statute; and if by any portion of the people, however large, an attempt should be made to interfere with the regular working of the agencies of government at any other time or in any other mode than as allowed by existing law, either constitutional or statutory, it would be revolutionary in character, and must be resisted and repressed by the officers who, for the time being, represent legitimate government."

The Supreme Court of our State has declared, not only in the decision in the case at bar, but in several prior decisions pointed out in the opinion and in my first brief, that the scheme of government given by our State constitution to Denver was and is purely municipal in character, and that

there was no intention, expressed or implied, in our constitution, either in article XX or any other part of it, to delegate the sovereign powers of the State in matters of county or State government to a charter convention of the city of Denver. Argumentatively they also said, but that was mere *obiter dictum* so far as the issues in this case were concerned, that the construction contended for by plaintiff in error would make it also in violation of the Federal Constitution.

So jealous have the courts been in the interpretation of constitutions to limit the power of the legislature, even as to elections, term of office, grounds of removal of officers, etc., as provided by the constitution, that it has been held in numerous States that the legislature cannot add to the constitutional qualifications of voters nor diminish them; nor shorten or extend the constitutional term of an office; nor practically abolish an office by repealing the provision for salary; nor add to the constitutional grounds for removal of an officer; nor provide for the choice of officers in a different mode than that prescribed by the constitution; nor, where the constitution limits the term, can an appointee under a statute providing for holding during good behavior hold beyond the constitutional term.

See numerous cases cited in Note 3 on these several points in Cooley's Constitutional Limitations (7th ed.), p. 99.

As to Plaintiff in Error Being Bound by the Judgment in His Favor in 31 Colo., 369.

In my first brief I have called attention to the fact that the plaintiff in error here, Charles S. Elder, was the relator in the original case (People *ex rel.* Elder *v.* Sours, 31 Colo., 369), decided by the Colorado Supreme Court, in which article XX of the State constitution was construed, and which decision and construction was in accordance with his then

contentions and in his favor, and has since been uniformly followed by later decisions in our Supreme Court, including the one of which he now complains. That original decision and judgment related to the same office involved in this case, which was then held by Elder. The relator in the case at bar is the successor of Elder to that office and was by the judgment of our Supreme Court in this case adjudged entitled to it. While, perhaps, strictly speaking, the parties to the case in 31 Colo., 369, and in this case are not identical, yet to all intents and purposes they are, and the subject-matter of the action was the same. In the former case they were The People of the State of Colorado on the relation of Charles S. Elder *v.* Paul J. Sours, and in the case at bar they are The People of the State of Colorado on the information of George Stidger, the district attorney, etc., on the relation of Charles W. Badgley *v.* Charles S. Elder. In other words, in the former case on one side were The People of the State of Colorado, with Elder as relator, and on the other the defendant Sours, claiming the office of treasurer; and in the case at bar on one side are The People of the State of Colorado, with Badgley as relator, and on the other the defendant, Elder, the plaintiff in error here, claiming the office of treasurer on the same grounds that Sours based his claim in the original case, decided adversely to that claim in 31 Colo., 369.

To be sure, the Sours case was one of mandamus, while this is one of *quo warranto*, but the real subject of the litigation was the same, namely the construction of article XX of our State constitution, as applied to the office of treasurer of the city and county of Denver and as to the scheme of government provided by the constitution for the city and county of Denver. Is not, therefore, the plaintiff in error bound by the decision and judgment in his favor in People *ex rel.* Elder *v.* Sours, 31 Colo., 369? May this not be a case

practically where the doctrine of *res adjudicata* may be applied?

Cooley's Const. Lim. (7th ed.), 79-82.
Forsyth *v.* Hammond, 166 U. S., 506, 516-518.

Moreover, it should be remembered that questions involved here are public and directly concern the people of the State of Colorado more than either the plaintiff in error or the relator.

This is not a case where mere private rights or interests only are involved; it affects the scheme of government for Denver. The motion recently filed herein suggesting the death of the relator Badgley and asking the substitution of his successor in office, William J. Fine, recites the fact that since the decision of the Supreme Court in the case at bar a general election was held in the city and county of Denver, at which Fine was elected treasurer for the unexpired term of Badgley—that is, to January 8 next—and also for the full term of two years beginning on said January 8 next. This shows that the public and the electors of the city and county of Denver have again, at the recurrence of another biennial election, expressed their will and filled, under the decisions of the Supreme Court of our State, the office involved in this proceeding by electing Mr. Fine thereto. This fact is not, of course, decisive of this controversy, but it is a persuasive reason why this court should both hesitate to take jurisdiction and to reverse the now long-settled and numerous decisions of the State Supreme Court as to the scheme of government for Denver authorized by our State constitution.

As was aptly said by this court in declining to take jurisdiction in a recent *quo warranto* case:

"It is obviously essential to the independence of States and to their peace and tranquillity, that their power to prescribe the qualifications of their own officers, the tenure of their offices, the manner of their election, and the grounds on which the tribunals before which, and the mode in which,

said elections may be contested, should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States," and adds that "the cases must necessarily be rare in which the interference of this court can be properly invoked."

See also

Taylor *v.* Beckham, 178 U. S., 548, 570.

Forsyth *v.* Hammond, 166 U. S., 506, 518-520.

Respectfully submitted.

HENRY J. HERSEY,
Counsel for Defendants in Error.

Supreme Court of the United States.

No. 132.—October Term, 1906.

Charles S. Elder, Plaintiff in Error, vs. The People of the State of Colorado on the information of George Stidger, the District Attorney of the Second Judicial District of the State of Colorado, on the relation of Charles W. Badgley.	In error to the Supreme Court of the State of Colorado.

[January 7, 1907.]

This was a proceeding, in the nature of *quo warranto*, brought in a district (State) court of Colorado, to test, as between conflicting claimants (Charles W. Badgley and Charles S. Elder), the title to the office of county treasurer of the city and county of Denver. The relator (Badgley) relied upon a general election held pursuant to the general statutes of Colorado on November 8, 1904, while the defendant (Elder) claimed to be the legal incumbent of the office by virtue of his election to the office of treasurer of the city and county of Denver in May, 1904, under authority of the charter of said city and county of Denver, The question presented for decision was whether the election held in May, 1904, under the charter, of officers to perform the duties required of county officers in the city and county of Denver, was lawful, or whether such officers should have been voted for under the general statutes of the State at the election held in November, 1904. A determination of this question made necessary a consideration of certain provisions of article XX of the State constitution, providing for the creation, from the old county of Arapahoe and the old city of Denver and other municipalities, of a new entity to be known as the city and county of Denver, and conferring authority to provide in the charter for the appointment or election of officers of such city and county. In particular, a construction was required of a clause providing that "every charter shall designate the officers who shall respectively perform the acts and duties required of county officers to be done by the constitution or the general laws, as far as applicable." The District Court sustained a demurrer to the complaint and entered judgment for the defendant. This judgment was reversed by the Supreme Court of the State, upon the authority of *People ex rel. etc.* v. *Johnson*, (86 Pac. Rep. 233,) and judgment was entered in that court in favor of the relator, (86 Pac. Rep. 250), deciding in effect that the charter provision under which defendant claimed

was repugnant to the constitution of Colorado. The case was then brought here.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The assignments of error are twenty-one in number. All of them rest upon the assumption that the Supreme Court of Colorado held that article XX of the State constitution, particularly sections 2 and 3, were repugnant to the provision of the Constitution of the United States guaranteeing to every State a republican form of government and to the act of Congress known as the Colorado Enabling Act, and that by such ruling rights possessed by the people of the State of Colorado and rights vested in the people of the city and county of Denver were invaded. And upon the assumption that such rulings were made all the Federal questions relied on are based.

On behalf of the defendant in error it is insisted that the Supreme Court of Colorado did not decide any question under the Constitution of the United States, but merely disposed of the case before it upon its construction of the meaning of the provision of the State constitution which was involved and upon the authority of a previous decision rendered by the Colorado court. It is not denied that in the course of the opinion of the Supreme Court of Colorado it was said that if the article of the State constitution in question was susceptible of a contrary construction to that affixed to it by the court, it would be repungent to the guarantee of a republican form of government, etc. This, it is said, was mere *obiter*, as the court considered and held the provision valid.

If we were to indulge in the hypothesis that the assumptions upon which the assignments of error rest were sustained by the record, and were besides to assume that at the proper time and in the proper manner it had been asserted that to hold article XX invalid would be repugnant to the Constitution of the United States, the case would yet not be within the purview of section 709, Revised Statutes. Under this section the power to review the judgment of a State court exists only in the following classes of cases: *a.* Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; *b.* Where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; *c.* "Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

It is plain that the case is not embraced within subdivision *a*. Nor can it be said to be embraced within subdivision *b*, for if we consider that the court below, instead of construing and upholding the constitutional provision in question, actually held it to be invalid because repugnant to the Constitution of the United States, such decision was *against* and not in favor of the validity of the article. Nor is the case embraced within subdivision *c*, for nowhere in the record does it appear that the plaintiff in error, specially or otherwise, set up or claimed in the courts of Colorado any title, right, privilege or immunity under the Constitution of the United States.

Indeed, under the circumstances disclosed, if there had been an assertion of a right, title, privilege or immunity under the Constitution of the United States it would have been so frivolous as not to afford a basis of jurisdiction, since it is foreclosed that a mere contest over a State office, dependent for its solution exclusively upon the application of the constitution of a State or upon a mere construction of a provision of a State law, involves no possible Federal question. (*Taylor* v. *Beckham*, 178 U. S. 548.) Whilst, when a State court has considered a Federal question, that fact may serve to elucidate whether a Federal issue properly arises for consideration by this court, that doctrine has no application to a case where the controversy presented is inherently not Federal, and incapable of presenting a Federal question for decision.

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.